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No. _____

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1992

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LEE WOODARD, et al.,

Petitioners,

v.

RALPH SEGHETTI, et al.,

Respondents.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

## QUESTIONS PRESENTED

1. Are law enforcement officers who engage in what are clearly non-discretionary acts of sexual harassment against female co-workers beyond the protection of qualified immunity from liability under 42 U.S.C. § 1983?

2. Was the law clearly established in this country by 1985 that sexual harassment violates the equal protection clause and is actionable under 42 U.S.C. § 1983?

3. Did the Court of Appeals invade the province of the jury by concluding that no reasonable person under the circumstances could have believed conditions were so intolerable that she had no choice but to resign?

4. Was the law clearly established by 1986 that retaliation for speaking out

about sexual harassment in the workplace violates the First Amendment?

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## PARTIES TO THE PROCEEDINGS IN THE TENTH CIRCUIT COURT OF APPEALS

Petitioners before this Court and plaintiffs-appellees below are Beverly DeSomber, Melinda Molina and Lee Woodard, trustee in bankruptcy for the estate of Janice Butler. Respondents and defendants-appellants below are Ralph Seghetti, Allen Tolley, Andy Williams, R.D. Sackett and Gary Mitchell.

## OPINIONS OF THE COURTS BELOW

The initial decision on the questions presented was rendered by the Honorable Alan B. Johnson, District Judge, United States District Court for the District of Wyoming and is submitted to the Court in the Appendix beginning at page 1a. Respondents appealed that decision to the Tenth Circuit Court of Appeals and that court's opinion is set forth in the Appendix beginning at page 64a. Petitioners' filed a petition for rehearing

and suggestion for rehearing en banc which the Tenth Circuit Court of Appeals denied. The order denying the petition for rehearing is set forth in the Appendix at page 114a.

## JURISDICTION

The opinion of the Tenth Circuit Court of Appeals which petitioners seek to have reviewed was rendered on October 19, 1992. Petitioners filed a motion for extension of time in which to file a petition for rehearing and suggestion for rehearing en banc which motion was granted. Petitioners filed the petition for rehearing in accordance with the Court's order and the petition for rehearing was denied by the Court on December 15, 1992. This petition for writ of certiorari is filed pursuant to 28 U.S.C. § 1254.

## RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

Section 1983, Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statue of the District of Columbia.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### I. Proceedings Below

Petitioners filed their complaint on May 11, 1990 in the United States District Court for the District of Wyoming alleging that they were subjected to sexual harassment by law enforcement officers during the course of their employment as dispatchers at the law enforcement center in Worland, Wyoming. Petitioners asserted claims against the five respondents in both their individual and official capacities for violations of their constitutional rights to equal protection, due process and freedom of speech under 42 U.S.C. § 1983. The district court had jurisdiction of the matter pursuant to 28 U.S.C. § 1331.

After discovery was substantially completed, respondents moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Respondents' motion was based in part on the assertion

that as government officials they are entitled to qualified immunity from liability under 42 U.S.C. § 1983. Respondents argued in essence that the rights petitioners claim were violated were not clearly established at the time of the conduct at issue.

In an order dated May 22, 1991, the district court denied respondents' motion for summary judgment. On the issue of qualified immunity, the court held that petitioners' First, Fifth and Fourteenth Amendment rights to free speech, equal protection and due process were clearly established at the time of the conduct at issue such that qualified immunity did not provide a defense for the respondents.

Respondents filed an interlocutory appeal from the district court's order to the Tenth Circuit Court of Appeals on the issue of qualified immunity. On October 19, 1992, the Court of Appeals issued an

opinion reversing the district court's order. In doing so, the court held that it was not clearly established in the Tenth Circuit until May of 1989 that sexual harassment under color of state law violates the equal protection clause; that it is not clearly established that retaliation for speaking out about sexual harassment violates the First Amendment; that it is not clearly established that a non-supervisor, non-co-employee can be liable under 42 U.S.C. § 1983 for violating another's right to free speech; that it is not clearly established that a non-supervisor, non-coemployee can be liable under 42 U.S.C. § 1983 for violating another's right to due process; and, that petitioner Butler failed to establish a genuine issue as to whether a reasonable person in her position would have believed her working conditions were so intolerable that she had no choice but to resign.

Petitioners filed a petition for rehearing and suggestion for rehearing en banc which the court denied without opinion on December 15, 1992.

**B. Statement of the Facts**

Because the decisions of the courts below were made on motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, the courts were required to examine all of the evidence on file in the light most favorable to the non-moving party. The statement of facts which follows is taken from the affidavits, depositions and other evidence contained in the appendices filed in the Tenth Circuit Court of Appeals.

Petitioners were employed as dispatchers by the City of Worland - Washakie County Joint Powers Board. The joint powers board was established by agreement of the city and county to operate the law enforcement center for the police

department and the sheriff's office. Although the joint powers board consisted of officials from the city and the county, including the chief of police and the sheriff, it was a separate governmental entity. Respondents Tolley, the police chief, and Seghetti, the sheriff, were on the board during the time at issue. Although petitioners were employees of the board, they worked on a day-to-day basis under the supervision and control of the sheriff and the chief of police. (Aplee. Supp. App. at 38).[1]

Jan Butler was employed by the Joint Powers Board as a dispatcher at the law enforcement center from March of 1985 until May 15, 1987. (Aplt. App. at 8-9). During that time, she was repeatedly harassed by officers and deputies with whom she worked. (Id. at 11-27). The officers' behavior was

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[1] The citations contained in the Statement of Facts are to the appendices filed with the briefs in the Tenth Circuit Court of Appeals.

common knowledge at the law enforcement center; because the officers and dispatchers all worked under the same roof, everybody knew about it, including the chief of police and the sheriff. (Id. at 24; Aplee. Supp. App. at 22-30).

Williams' conduct was particularly offensive to Butler in that he was constantly touching her and talking about sex to her. (Id. at 11, 13, 15-18, 20-21, and 25). He was always putting his hands on her shoulders, pinching or patting her on the bottom and coming up behind her and pretending to masturbate. (Id. at 20). On at least one occasion, Williams asked Butler for a "blow job." (Aplee. Supp. App. at 25-27).

There is no way of counting the number of times Williams did these things to her - it happened about every time they worked the same shift and went on for two years. (Aplt. App. at 16-18).

Butler did not believe Williams was joking when he made sexual advances and talked about sex to her. (Id. at 21 and 25). Because she thought he was serious, his language was all the more offensive to her. (Id. at 25). When Butler told Williams she was offended by his conduct, he laughed. (Id. at 18).

Sackett's conduct was similar to that of Williams. (Id. at 22). He was always giving Butler neck massages or trying to look down her shirt. (Id. at 22). When Butler told him not to touch her, he would laugh. (Id.)

On December 10, 1985, Butler was riding with Williams in his patrol car. (Id. at 11). He took her out to a pond and commented that "this is where the neckers come." (Id.) He then pulled the car over, stopped, turned off the lights and pulled Butler toward him. (Id.) She pulled away

from him and told him to take her back to the law enforcement center.

Butler immediately complained to another officer about Williams' conduct, but asked him to keep it to himself because she was concerned she might lose her job if her complaints became known. (Id. at 15, 18, 19; Aplee. Supp. App. at 78-80). The officer told her he did not think she would be fired but he could not guarantee it. (Id. at 80). He agreed not to disclose her complaint to anyone, but did write down what she told him about the incident with Williams. (Id.)

In February of 1987, another officer discussed Williams' conduct with Tolley. (Aplee. Supp. App. at 127, 128). Tolley spoke with the police captain about the problem and the captain then spoke with Butler who described the harassment by Williams, including the incident in the patrol car. (Aplee. Supp. App. at 113 -

115). The captain did not tell Butler she needed to file a formal complaint or in fact any complaint at all, but told her he and the chief would take care of the matter. (Id.)

In March of 1987, after hearing nothing more from Tolley or the captain, Butler retained an attorney who wrote a letter setting out her complaints to the city attorney. The letter was copied to the chief of police and the members of the joint powers board. (Id.; Aplt. App. at Exhibit 1). The city attorney responded by informing Butler that she needed to file a "formal" complaint (even though she had already sent her complaint in writing to the city attorney, chief of police and the joint powers board and discussed her complaints with the captain who informed her no further complaint was necessary and that he and the chief would take care of it and).

In a letter dated May 14, 1985, Butler again complained to Tolley about Williams' conduct. (Id. at Exhibit 5). By this time, however, Butler decided she could not continue working under existing conditions and informed Tolley she was resigning. (Id.) Only after Butler complained on three separate occasions, resigned from her position and moved to New York was a hearing scheduled to address her complaints. (Id. at 43-44). Butler did not return to Wyoming from New York to attend the hearing.

Melinda Molina was employed as a dispatcher at the law enforcement center from August of 1985 until May 5, 1990. She, like Butler, was subjected to sexual comments and conduct by certain law enforcement officers.

Williams began to sexually harass her about six months after she started working as a dispatcher. It happened so frequently

thereafter Molina could not estimate the number of times it happened. (Aplt. App. at 17, 18 & 22). He made comments to her on more than one occasion such as, "I'd like to rip your tits off" and "spread 'em", and would grab her neck, lean up close to her and say "I want your bod." (Id. at 18-21). Sackett tried to "hit on her" and would rub her neck and let her know he would go to bed with her if she wanted. (Id. at 73). There were times when the officers' treatment of her left her in tears. (Aplee. Supp. App. at 28-30, 131).

In August of 1989, Molina was working at her desk in the law enforcement center when Williams approached her about a bill. When she told him she didn't know anything about it, he swore at her and stated that he wished she would "fucking" do something about the bill. (Aplt. App. at 24). He then "stormed back to his office and was

pacing around talking and swearing, mainly 'fuck'." (Id. at Exhibit 1).

Molina complained to her supervisor, Beverly DeSomber, about Williams' conduct and then complained directly to Tolley. (Id. at 28-29). When nothing was done, Molina submitted a written complaint to DeSomber who delivered it to Tolley and the mayor. (Id. at 30). In the complaint, Molina discussed the swearing incident as well as numerous instances of verbal abuse and sexual harassment by Williams over a four year period, referring specifically to comments made by Williams such as "I'd love to rip your titties off," "spread 'em, baby," and "I want your bod." (Id. at Exhibit 1).

In addition to her written complaint to the chief of police and the mayor, Molina filed a claim with the Wyoming Fair Employment Commission and complained to the joint powers board. (Id. at 38; Aplee.

Supp. App. at 120). Although a letter of reprimand was allegedly placed in Williams' file sometime after Molina submitted her written complaint, Molina was not informed of that until November 27, 1989 and was not allowed to see the letter. (Aplt. App. at 44 & Exhibit 4).

In any event, after Molina complained to Tolley and the mayor about Williams, she began to experience a different kind of harassment from Williams and other officers. (Aplee. Supp. App. at 22-24, 87-108). Williams particularly would stare at her or stand behind her chair until she asked him what he wanted and then say "nothing." (Aplt. App. at 43). Conversations between officers stopped when she walked into the room and meetings were held where the only words the officers made sure she heard were "sexual harassment." (Id. at 50-51). The officers made rude gestures and innuendos and Molina felt like

she was being intentionally isolated from other employees. (Id.; Aplee. Supp. App. at 97-99). There were times when she was not given a break during an eight hour shift. (Id. at 103). Molina complained to the joint powers board in December of 1989 but nothing was done. (Id. at 121-123). Finally, in May of 1990, Molina determined she could no longer tolerate the harassment and resigned.

Beverly DeSomber was employed as a dispatcher at the law enforcement center from June of 1985 until May of 1990. She was also regularly subjected to sexual harassment by Sackett, Williams and others. (Aplt. Supp. App. at 48-63). On at least one occasion, Sackett came into dispatch and asked her to go out back and "mess around." (Id. at 48). When she refused, Sackett went to her supervisor and complained that DeSomber wasn't giving him the respect he deserved. (Id. at 49).

Williams would stand behind her chair and pretend to masturbate, pat her on the bottom, say "I'm going to rip your tits off" and tell her to "spread 'em." (Id. at 57-62).

In July of 1989, Sackett stopped DeSomber on the highway and asked her to kiss him. (Id. at 50). DeSomber complained to Tolley about the incident. (Id. at 51).

Because of her own experiences and because she believed no employee should have to put up with sexual harassment, DeSomber openly supported Molina's complaint against Williams. Seghetti put pressure on her to stop Molina's complaint and when she refused, she was subjected to harassment of a different kind. (Aplee. Supp. App. at 22-24, 39-62, 65-72). She was excluded from joint powers board meetings, discussions began about demoting her, efforts were made to dissolve the

joint powers board in order to obtain direct control over dispatch, information that previously came to her as communications supervisor was re-routed, derogatory remarks were made about her and officers stopped talking to her. (Id.). DeSomber complained to the joint powers board in December of 1989 but nothing was done about it. (Id. at 121-125). Finally, in May of 1990, DeSomber concluded she could no longer tolerate the harassment and resigned.

## ARGUMENT

**I. The application of qualified immunity to shield respondents from liability for non-discretionary acts is in conflict with this Court's prior rulings and raises important questions of federal law which must be addressed by this Court.**

The federal question presented to the Tenth Circuit Court of Appeals, and which petitioners now ask this Court to review, is whether under the facts set forth above respondents are entitled to qualified

immunity under 42 U.S.C. § 1983. That is, are law enforcement officers who threaten to "rip [female co-workers'] tits off," pretend to masturbate on them, ask them for "blow jobs," touch them on the buttocks and breasts, talk about sex to them and ask them to "spread their legs" entitled to the protection from liability afforded by qualified immunity? Applying the principles repeatedly set forth by this Court, the answer to this inquiry is clearly no. To conclude otherwise would be to extend the protection of the qualified immunity defense beyond what was ever intended.

In a long line of cases, this Court has consistently adhered to the principle that qualified immunity is not a "badge of exalted office" shielding officials from liability under any circumstances. Scheuer v. Rhodes, 416 U.S. 232, 242-43 (1974).

> Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of government officials have "the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government." Id., at 248, quoting Sterling v. Constantin, 287 U.S. 378, 397 (1932).

With these principles in mind, this Court has made qualified immunity available as a defense to officials *only* insofar as they are performing discretionary functions and reasonably but mistakenly conclude their actions are lawful. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Anderson v. Creighton, 483 U.S. 635, 641 (1987).

The rationale behind affording qualified immunity under those limited circumstances is that when an official mistakenly violates an individual's rights while engaged in a discretionary function which he is required by law to perform, the public interest in encouraging him to

decisively carry out his official duties without fear of personal liability outweighs the interest of the private citizen in protecting his constitutional rights. Harlow, supra at 807. The same rationale does not apply when an official violates a private right through abuse of office or while engaged in non-discretionary conduct which he is not required by law to perform. Scheuer, supra at 243, citing Monroe v. Pape, 365 U.S. 167, 172 (1961); Mitchell v. Forsyth, 472 U.S. 511, 524 (1985). Under those circumstances, qualified immunity is not available as a defense.

> When there is a substantial showing that the exertion of state power has overridden private rights secured by the Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. Scheuer, supra at 249, quoting Sterling, supra at 397-98.

Because qualified immunity provides a defense to officials only insofar as they are performing discretionary functions, resolution of the question whether immunity shields an official from liability must take into account the particular functions and responsibilities with which the official is entrusted. Scheuer, supra at 243. This "functional" approach to immunity questions runs consistently throughout the decisions of this Court and requires courts faced with claims of qualified immunity to examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted before affording qualified immunity protection. Forrester v. White, 484 U.S. 219, 224 (1988). The relevant question is whether the official acted within the range of discretion permitted to holders of such office under the law.

> It is not the title of his office but the duties with which a particular officer sought to be made to respond in damages is entrusted - the relation of the act complained of to 'matters committed by law to his control or supervision' - which must provide the guide in delineating the scope of the rule which clothes the official acts of the [official] with immunity from civil . . . suits. Scheuer, supra at 247, quoting Barr v. Matteo, 360 U.S. 564, 573-74 (1959).

Applying this "functional" approach, this Court has afforded qualified immunity to law enforcement officers in the context of making an arrest, Pierson v. Ray, 386 U.S. 547 (1967), applying for an arrest warrant, Malley v. Briggs, 475 U.S. 335 (1986), and conducting a warrantless search, Anderson v. Creighton, supra. Qualified immunity has *never* been afforded by this Court to law enforcement officers engaged in sexually harassing their female co-workers. Each of the acts set forth above for which qualified immunity has been

afforded is a matter entrusted by law to the control of the officer. Each of those acts also necessarily involves the exercise of discretion, and sometimes immediate action, on the part of the officer on the basis of the evidence before him. Under those circumstances, affording the officer qualified immunity from liability serves the public interest in promoting swift and decisive action by law enforcement officers in carrying out their official duties without fear of personal liability.

In contrast, the acts alleged here did not involve matters entrusted by law to the respondents nor do the acts involve the exercise of official discretion on the part of respondents. Instead, the acts alleged involve intentional misconduct, abuse of office and non-discretionary conduct which had nothing to do with the respondents' official duties or the matters which they are entrusted by law to perform. Affording

respondents qualified immunity from liability under these circumstances does not serve the public interest. Under these circumstances, this Court has said qualified immunity is not available as a defense and the holding of the Tenth Circuit Court of Appeals conflicts with the decisions of this Court.

**II. The holding that the law was not clearly established until May of 1989 that sexual harassment violates the equal protection clause is in conflict with the decisions of other United States Courts of Appeal and this Court.**

This Court has consistently held that an official is not entitled to qualified immunity if his conduct violates clearly established rights of which a reasonable person would have known. Harlow, supra at 818. On the one hand, when an official is performing a discretionary function and reasonably but mistakenly concludes his conduct is lawful in light of existing law, he will not be personally liable.

Anderson, supra at 641. On the other hand, when an official is performing non-discretionary conduct *or could be expected to know* his conduct would violate existing rights, he may be personally liable. Mitchell, supra at 524. The critical question in determining whether a right is clearly established is whether a reasonable person in the official's position could have believed his conduct was lawful. Anderson, supra at 641.

The first major federal legislation prohibiting discrimination on the basis of sex with respect to conditions of employment was passed in 1964, over twenty years before the conduct at issue here. Title VII of the 1964 Civil Rights Act, §703(a), 42 U.S.C. §2000e-2a (1982). That legislation was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." Sprogis v. United Airlines,

Inc., 444 F.2d 1194 (7th Cir. 1971). That sexual harassment claims were viewed as part of the spectrum is evidenced by the EEOC guidelines on sexual harassment published on November 10, 1980 which specifically state that:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 45 Fed. Reg. 25024 (1980).

The State of Wyoming has had similar legislation in place prohibiting discrimination on the basis of sex with respect to conditions of employment since 1965. W.S. §27-9-105 (1977).

In addition to the statutory and administrative provisions in existence, numerous courts had recognized by 1985 that sexual harassment in the work place constitutes unlawful discrimination.

Barnes v. Costle, 561 F.2d 983, 994 (D.C. Cir. 1977) (inviting sexual relations from a female employee constituted discrimination on the basis of sex); Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044, 1047 (3rd Cir. 1977); Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Morgan v. Hertz Corp, 542 F.Supp. 123 (W.D. Tenn. 1981), aff'd, 725 F.2d 1070 (6th Cir. 1984); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Craig v. Y&Y Snacks, 721 F.2d 77 (3rd Cir. 1983); Williams v. Saxbe, 413 F.Supp. 654 (D.D.C. 1976). The United States Supreme Court expressly adopted the holdings of these courts in 1986 when it unanimously held that sexual harassment is a form of sex discrimination and a hostile work environment violates a woman's constitutional right not to be

discriminated against on the basis of her sex. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

Under general well developed legal principles and existing law, a reasonable official would not have been unaware between 1985 and 1990 that overt sexual harassment of the type alleged and in some instances admitted in this case was unlawful.

That such conduct was unlawful and actionable under the equal protection clause of the Fourteenth Amendment was similarly well established.[2] By 1979, it was clearly established that the equal

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[2] Despite the clear state of the law making it unlawful to engage in sexual harassment, some courts have suggested that violations of Title VII do not affect a defendant's immunity in a suit brought under the equal protection clause. This is an untenable distinction - an official who knows his sexual harassment of another is unlawful under clearly established law should not be afforded immunity merely because his victim brings suit under a different law proscribing the same conduct. However, for the purposes of this case, the distinction is not significant given the evolution of sexual harassment claims brought under the equal protection clause.

protection clause prohibited gender discrimination, including sexual harassment, unless it was substantially related to a legitimate government objective. Davis v. Passman, 442 U.S. 228 (1979). All circuit courts and district courts which addressed the issue beginning in 1979 agreed that sexual harassment was actionable under the equal protection clause. Huebschen v. Dept. of Health and Social Services, 716 F.2d 1167, 1172 (7th Cir. 1983) (sexual harassment consisting of embarrassing and belittling remarks to a female police officer, sexual advances made to her by a male officer and harassment of male officers seeking to work with her presented a "classic case" of sexual harassment actionable under equal protection); Bohen v. City of East Chicago, 799 F.2d 1180, 1185 (7th Cir. 1986) (sexual harassment constitutes sex discrimination for purposes of equal protection); Gobla

v. Crestwood School District, 609 F.Supp. 972, 978 (M.D.Pa. 1985) (citing Reed v. Reed, 404 U.S. 71 (1971) for the principle that "it is well settled that claims of sex discrimination are cognizable under the equal protection clause"); Moire v. Temple University, 613 F.Supp. 1360, 1366 (E.D.Pa. 1985); Scott v. City of Overland Park, 595 F.Supp. 520, 529 (D.Kan. 1984) (a case arising in the Tenth Circuit in which it was claimed sex discrimination violated equal protection and the court said the law was clearly established); Skadegaard v. Farrell, 578 F.Supp. 1209 (D.N.J. 1984); Woerner v. Brzeczek, 519 F.Supp. 517 (N.D.Ill. 1981); Blessing v. County of Lancaster, 609 F.Supp. 485 (E.D.Pa. 1985) (allegations of persistent harassment and conditioning promotion on acceptance of a dinner invitation stated cause of action under § 1983); Estate of Scott by Scott v. deLeon, 603 F.Supp. 1328, 1332 (1985)

(citing several cases from this Court and stating that by 1979 common sense as well as case law indicated that harassment was prohibited under equal protection).

Other courts subsequently held it was clearly established by the early 1980's that sexual harassment was unlawful. Poe v. Hayden, 853 F.2d 418, 429 (6th Cir. 1988) (law clearly established before December 1984 that sexual harassment by officials violated equal protection; citing Goodwin v. Circuit Court of St. Louis County, Missouri, 729 F.2d 541, 546 (8th Cir. 1984) ("the right to be free from invidious discrimination on the basis of sex certainly is clearly established, and no one who does not know about it can be called 'reasonable' in contemplation of the law"); Fuchilla v. Prockop, 682 F.Supp. 247 (D.N.J. 1987) (clearly established by 1981 that sexual harassment was actionable under § 1983).

Like these courts the Tenth Circuit Court of Appeals has held that sexual harassment violates equal protection and has applied that rule to harassment occurring in 1982. Starrett v. Wadley, 876 F.2d 808, 814 (10th Cir. 1989). This is consistent with the approach taken by many courts, including the Third Circuit which held in 1990 that the general right to be free of sex discrimination in the work place was, by 1986, "well grounded in law" and "widely known to the public." Andrews v. City of Philadelphia, 895 F.2d 1469, 1479 (3rd Cir. 1990) (even in the absence of precisely analogous precedent, defendants objectively should and a reasonable official would have known the applicable legal standard.)

Despite all of these cases, the Tenth Circuit Court of Appeals in this case has effectively stated that a reasonable official in respondents' position would

have believed as recently as 1989 that it was lawful in the work place to ask a woman for a "blow job," to pretend to masturbate on her, to pinch or pat her on the buttocks, to talk about sex to her, and to make comments such as "spread 'em" and "I'd like to rip your tits off." This holding creates a conflict between the Tenth Circuit Court of Appeals and the other United States Courts of Appeals. The Tenth Circuit's holding is also contrary to the decisions of this Court which have consistently held that qualified immunity does not afford protection when an official could be expected to know his conduct would violate existing rights. Given the clear weight of authority in existence by 1985, a reasonable official in respondents' position could have been expected to know that what they were doing violated petitioners' rights.

**III. The holding that no reasonable person under the circumstances would have believed conditions were so intolerable that she had to resign departs so far from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.**

This Court has consistently held that summary judgment will not lie if the dispute about a material fact is *genuine*, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

It is also clear from the decisions of this Court that at the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter. Id. at 249. Rather, the threshold inquiry is whether there are any genuine factual issues that properly can be resolved only by a jury because they may reasonably be resolved in favor of either party. Id. at 250. If reasonable minds could differ as to the import of the

evidence, summary judgment should not be granted. Id. at 250-51. It is only where the evidence is so one-sided that one party must prevail as a matter of law that summary judgment is proper. Id. at 252.

The Tenth Circuit Court of Appeals in this case held in effect that reasonable minds could not differ as to whether the respondents' conduct made working conditions so intolerable that a reasonable person would have resigned and that the evidence as to whether Butler took reasonable steps to make working conditions tolerable could not reasonably be resolved in her favor but was so one-sided that respondents must prevail.[3]

The evidence in this case was that over the course of the two years Butler worked as a dispatcher, she was repeatedly

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[3] That reasonable minds could differ over these questions could not be more aptly demonstrated than by the different results reached by the Court of Appeals and the District Court. See Appendices A and B.

subjected to overt acts of sexual harassment by law enforcement officers - acts which the Tenth Circuit Court of Appeals characterized as "offensive and unacceptable." When she discussed the officers' conduct with the police captain, she was not told she needed to file a complaint but was told instead that he and the chief of police would take care of the problem. When the problem was not taken care of, Butler had her attorney send a letter on her behalf detailing her complaints. These efforts to make working conditions tolerable were deemed insufficient and she was informed she needed to file a "formal" complaint.

Whether a reasonable woman would have concluded under these circumstances that she had no choice but to resign was properly a matter for the jury to decide. A jury could easily conclude from the evidence presented that Butler's efforts to

make conditions tolerable were sufficient, that she did all a reasonable person should be required to do under the circumstances, that those in authority did not act reasonably or promptly under the circumstances to stop the harassment and that under the circumstances a reasonable person would have resigned.

In light of the evidence presented, the Court of Appeals' holding is so contrary to the standards adopted by this Court for summary judgment that review is necessary.

**IV. The holding that it is not clearly established that retaliation for speaking out about sexual harassment in the workplace violates the First Amendment is contrary to the decisions of the Tenth Circuit Court of Appeals as well as the decision of at least one other United States Court of Appeal.**

It has been clearly established for at least a decade that speech is a matter of public concern if it addresses important constitutional rights which society has an

interest in protecting. Connick v. Myers, 461 U.S. 138, 149 (1983). It has also been clearly established that speech which discloses wrongdoing or breach of the public trust by public officials is a matter of public concern. Id. at 148.

Relying on these clearly established principles, the district court held in this case that the complaints made by petitioners about respondents' conduct raised issues of public concern. The court said:

> The complaints of each [petitioner] revealed improprieties on the part of law enforcement officers, at times affecting the proper functioning of a public office located at the law enforcement center. These complaints clearly relate to matter of public concern. Appendix at 23a-24a.

In reversing the district court's ruling as to the First Amendment claims, the Tenth Circuit Court of Appeals stated:

> [A]s of the time of the alleged unconstitutional retaliation here, we are aware of no case holding that

> speech similar to that made by Plaintiffs pertained to a matter of public concern under the Connick test. See Starrett v. Wadley, 876 F.2d at 816 (finding it unnecessary to reach the issue); Gray v. Lacke, 885 F.2d at 411 (concluding that allegations of personal sexual harassment do not rise to the level of public concern). Thus, we simply cannot conclude that the Supervisors' alleged response to Plaintiffs' complaints of sexual harassment violated any clearly established rights of Plaintiffs under the First Amendment. Appendix at 111a-112a.

In Wulf v. City of Wichita, 883 F.2d 842, 860 (10th Cir. 1989) the Tenth Circuit Court of Appeals itself stated that "allegations of sexual harassment have been found to involve matters of public concern." In support of this principle, the Court of Appeals cited Wren v. Spurlock, 798 F.2d 1313, 1317 (10th Cir. 1986) in which it held that a letter containing complaints about sexual harassment of students and teachers related to a matter "about which the community would be understandably concerned" and thus

was a matter of public concern protected by the First Amendment.

As of the time of the alleged unconstitutional retaliation in this case (the spring of 1987 until May of 1990), there were two cases from petitioners' own circuit holding that speech alleging sexual harassment related to a matter of public concern.

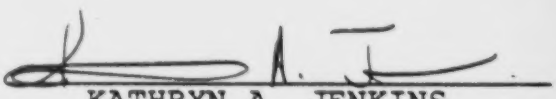
Not only are Wulf and Wren in conflict with Gray v. Lacke, 885 F.2d 399 (7th Cir. 1989), they are in conflict with the Tenth Circuit Court of Appeals' decision in this case.

## CONCLUSION

On the basis of the arguments set forth above, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to review the decision of the Tenth Circuit Court of Appeals and resolve the conflict concerning 1) whether qualified immunity shields

officials from liability for non-discretionary acts; 2) whether it was clearly established as of 1986 that sexual harassment violated the equal protection clause; 3) whether the evidence presented raises a genuine issue as to whether a reasonable person would have resigned under the circumstances; and, 4) whether it was clearly established that complaints about sexual harassment relate to a matter of public concern.

Respectfully submitted this 15th day of March, 1993.



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# APPENDICES

**APPENDIX A**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

| | |
|---|---|
| LEE WOODARD, trustee in bankruptcy of the estate of JANICE BUTLER, MELINDA MOLINA, and BEVERLY DESOMBER,<br><br>Plaintiffs,<br><br>v.<br><br>THE CITY OF WORLAND, WYOMING-WASHAKIE COUNTY, WYOMING JOINT POWERS BOARD; RALPH SEGHETTI, personally and in his capacity as Sheriff of Washakie County; ALLEN TOLLEY, personally and in his capacity as Chief of Police for the City of Worland; ANDY WILLIAMS, personally and in his capacity as an officer for the City of Worland Police Department; R.D. SACKETT, personally and in his capacity as Under-sheriff for Washakie County; and GARY MITCHELL, personally and in his capacity as a Sergeant with the Washakie County Sheriff's Department,<br><br>Defendants. | Docket No. C90-0111J |

## ORDER ON PENDING MOTIONS

THE ABOVE CAPTIONED MATTER came regularly before the Court on the Defendants Seghetti, Tolley, Williams, Sackett and Mitchell's 7 September 1990 Motions for Summary Judgment and the Defendant Joint Powers Board's 17 September 1990 Motion for Summary Judgment.

The plaintiffs, three employees of the City of Worland, Wyoming-Washakie County, Wyoming Joint Powers Board [JPB or the Board] have brought this action contending that in their employment as dispatchers at the Law Enforcement Center in Worland, Wyoming, they were subjected to sexual harassment by certain law enforcement officers of the Washakie County Sheriff's Department and the Police Department of the City of Worland, Wyoming. Following completion of discovery, all officers and the Board have presented motions for summary judgment.

## I. FACTS

In 1985 the Joint Powers Board was established to operate a joint communications facility for the Worland Police Department and Washakie County Sheriff's Department. (DeSomber Depo., at 202, 226). The sheriff's department and police department are separate agencies of county and city government, and are separate entities from the Board. The Board established its own personnel policies and pay schedules and hired its employees. (DeSomber Depo., at 203-05). In 1985 the JPB was governed by a five-person board consisting of representatives from the city, county, police department, sheriff's office, and an at-large member. The chief of police and the sheriff were ex officio board members, who were allowed to vote on matters coming before the board. (DeSomber Depo., at 202). The board was

restructured in 1990. (Affidavit of John P. Worrall).

During the periods pertinent to this action, each of the plaintiffs were employed as dispatchers at the law enforcement center, in the communications facility operated by JPB. Jan Butler was employed as a dispatcher from March 1985 until May 15, 1987, (Butler Depo., at 8-9), Melinda Molina from August 1985 until May 5, 1990, and Beverly DeSomber from June 1985 from June 1985 until May 1990. DeSomber was the supervising dispatcher during the time she worked for JPB. As employees of the JPB, the plaintiffs' employment was governed by an employment manual which prohibited sexual harassment and discrimination and provided for permanent employment. (Plaintiffs' Complaint, at ¶ 11).

The allegations in the complaints of each of the plaintiffs are remarkably

similar. Each contend that they were repeatedly harassed by officers and deputies with whom they came in contact as a result of their employment as dispatchers. (Butler Depo., at 11-27; DeSomber Depo., at 48-63; Molina Depo., at 17-18; Affidavit of Randy Feathers; Turner Depo., at 5). The conduct of two defendants, police officer Andy Williams and Deputy R.D. Sackett, has been described with particularity. Each of the plaintiffs has discussed sexually harassing conduct by Williams. (Butler Depo., at 11, 13, 15-18, 20-21, 25; Molina Depo., at 17-24; DeSomber Depo., at 48-63). They contend that Williams' conduct included offensive touching, such as pinching or patting on the buttocks and making sexual propositions. Williams is accused of having remarked to the plaintiffs, among other things, "I'd like to rip your tits off," "spread 'em," and "I want your bod."

(Molina Depo., at 18-21; DeSomber Depo., at 57-62).

A similar complaint is made by the plaintiffs concerning the conduct of Sackett. He is accused of touching the dispatchers and attempting to look down the shirt of plaintiff Butler. (Butler Depo., at 22). When told not to touch her, Sackett would laugh. (Butler Depo., at 22). Undersheriff Sackett would rub Molina's neck and let her know that he would go to bed with her if she wanted. (Molina Depo., at 73). Beverly DeSomber alleges that, throughout her employment, sexual advances were made by Sackett two or three times a week. (DeSomber Depo., at 50-6). He asked her to "mess around," and when she refused, complained to DeSomber's supervisor that she wasn't giving him the respect he deserved. (DeSomber Depo., at 49). At one time, Sackett asked DeSomber to kiss him. (DeSomber Depo., at 50).

Each of the plaintiffs approached the problems of the perceived sexual harassment in a different manner. Following an incident with Officer Williams on 10 December 1985, Ms. Butler complained privately to Officer Dick Gaulke about Williams' conduct, but requested that Gaulke keep her concerns to himself. (Butler Depo., at 11, 15, 18-9; Gaulke Depo., at 7-9). Approximately one year later Officer Don Lawton, acting on his own, informed the police chief that Williams was mistreating Butler. (Tolley Depo., at 28-9). Chief Tolley directed Captain Richardson to discuss the matter with Butler and he was then told the complaints concerning Williams' activities. (Richardson Depo., at 9-10, 12). Approximately one month later, in March 1987, Butler's attorney wrote a letter to the Worland City Attorney with copies to the members of the JPB. (Butler Depo.,

exhibit 1). The Worland City Attorney then instructed plaintiff to file a formal complaint with the chief of police. (Butler Depo., exhibit 2). Although the formal complaint was made on 14 May 1985, Butler had already determined that she could not continue to work under the conditions and resigned.

In August 1989, an incident occurred between Officer Williams and Molina during which Williams is alleged to have sworn at her. (Molina Depo., P. 24). Molina complained to her supervisor, DeSomber, and to Chief Tolley. (Molina Depo., at 28-29). A written complaint was later filed. (Molina Depo., at 30). A copy of this complaint, detailing the alleged conduct of Williams, was sent on to the Mayor of Worland. Molina also filed a complaint with the Wyoming Fair Employment Practices Commission and with her employer, the JPB. (Molina Depo., at 38; Taylor Depo., at 10).

As a result of these charges, Williams was disciplined by letter of reprimand, which was placed in his file. (Molina Depo., at 44, Exhibit 4). Molina contends that, as a result of her complaint, Williams and other officers began treating her differently. (Molina Depo., at 43-63; Worthington Affidavit). She contends that conversations would stop when she walked into a room and that the words "sexual harassment" were discussed in her presence. (Molina Depo., at 50-51). In December 1989, Molina complained to the JPB and nothing was done. (Taylor Depo., at 39-41). In May 1990, Molina resigned after determining that she could no longer work under the conditions at the dispatch facility.

As the supervising dispatcher, DeSomber was in a different position than the other plaintiffs. After she supported Molina in her complaint against Williams,

she alleges that Sheriff Seghetti pressured her to stop the complaint. When she refused she was subjected to further harassment.(Worthington Affidavit; DeSomber Depo., at 67-68). This alleged harassment took the form of exclusion from JPB meetings, discussions about demoting DeSomber and filling her position with another. DeSomber apparently did not complain to her employer about this harassment until December 1989, and when nothing was done about her complaints, she also concluded that she could no longer work at the law enforcement center, and resigned in May 1990. (Taylor Depo., at 39-41, Exhibit 1).

The conduct of Williams with regard to Butler was considered in a grievance proceeding in the summer of 1987. Butler, however, did not appear at the hearing. (Butler Depo., at 44-45). As a result, Chief Tolley did not proceed further with

disciplinary action against Williams. (Tolley Depo., at 131). Nonetheless, Butler contends that her complaint was submitted in writing to members of the JPB, who should have been aware of the offensive nature of her employment conditions. The complaints of Molina and DeSomber were brought to the attention of the JPB in November 1989. The JPB reacted by issuing a letter condemning such conduct. (DeSomber Depo., at 224-28, Exhibit 1).

As a result of this continuing harassment, the plaintiffs each contend that they were forced to resign their positions. This action was brought on 11 May 1990 pursuant to 42 U.S.C. § 1983, alleging violations of constitutional rights under the First, Fifth, and Fourteenth Amendments of the United States Constitution and pursuant to the law of the State of Wyoming, alleging breach of contract, tortious interference with

contract and breach of an implied covenant of good faith and fair dealing.

The defendants Williams, Sackett and Mitchell move the Court for summary judgment as to each of the constitutional claims, contending that they are entitled to qualified immunity for their actions. The defendants also challenge the factual bases underlying all claims.

The defendants Tolley and Seghetti move the Court for summary judgment as to each of the constitutional claims, also contending that they are entitled to qualified immunity for their actions, but in their supervisory capacities. They challenge the factual bases for each claim.

The defendant Joint Powers Board moves the Court for summary judgment as to each count of the complaint, asserting qualified immunity. Further, the Board contends that any cause of action for retaliatory acts may not be maintained under § 1983, but

lies only under Title VII. The Board challenges the factual bases of each of the constitutional claims and the state claims. Finally, JPB argues that Jan Butler is not the real party in interest in this action, and that her state claims are barred by the applicable statute of limitations.

## II. DISCUSSION

### A. Standard on Summary Judgment

Pursuant to Fed.R.Civ.P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits on file, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law." The moving party has the burden of showing the absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party's burden may be

met by identifying those portions of the record demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In determining whether these burdens have been met, the court is required to examine all evidence in the light most favorable to the non-moving party. Barber v. General Electric Co., 648 F.2d 1272 (10th Cir. 1981).

Once the moving party has met its initial burden, the burden shifts to the party resisting the motion. That party must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Manders v. Oklahoma ex rel. Dept. of Mental Health, 875 F.2d 263, 265 (10th Cir. 1989) citing Celotex, 477 U.S. at 325.

The defendants' motions for summary judgment are based partly on the claim that

they are entitled to qualified immunity for any actions taken, resulting in the alleged sexual harassment of the plaintiffs. The defendants correctly assert that if they are entitled to qualified immunity, they will be shielded from the constitutional claims asserted against them pursuant to 42 U.S.C. § 1983. Pueblo Neighborhood Health Centers v. Losavio, 847 F.2d 642, 647 (10th Cir. 1988).

> The general rule of qualified immunity is intended to provide government officials with the ability reasonably [to] anticipate when their conduct may give rise to liability for damages.' Davis v. Scherer, 468 U.S. 183, 195, 104 S. Ct. 3012, 3019. Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law.

Anderson v. Creighton, 483 U.S. 635, (1987). On motion for summary judgment in a section 1983 action, the plaintiff has the burden of identifying both the clearly

established law that was violated and the specific conduct which violated it. Coen v. Runner, 854 F.2d 374, 377 (10th Cir. 1988). A failure of the plaintiff to do so requires the court to enter judgment in favor of a defendant who has pled the defense. Lutz v. Weld County School Dist., 784 F.2d 340 (10th Cir. 1986). When the plaintiff has met this burden, the defendant must then demonstrate that no issue of material fact exists as to the objective reasonability of his or her actions in light of the facts known at that time. Coen, 854 F.2d at 377; Losavio, 847 F.2d at 646. "A defendant who makes such a showing of objective reasonableness is entitled to summary judgment unless the plaintiff can demonstrate that there are factual disputes relevant to the defendant's claim to immunity." Coen, 854 F.2d at 377, citing DeVargas v. Mason &

Hanger-Silas Co., 844 F.2d 714 (10th Cir. 1988).

**B. Qualified Immunity**

The Court notes initially that qualified immunity is a defense only to the actions filed against the individual defendants in their personal capacities, Kentucky v. Graham, 473 U.S. 159, 167 (1985), and is not available in an official-capacity action. Owen v. City of Independence, 445 U.S. 622 (1980).

The defendants have properly raised the issue of qualified immunity and the burden has shifted to the plaintiffs to establish that the law relied upon by plaintiffs was clearly established at the time the defendants allegedly deprived the plaintiffs of their civil rights. Lutz, 784 F.2d 340, 342. The basis for liability for civil damages in civil rights actions was significantly changed in Harlow v. Fitzgerald, 457 U.S. 800 (1982). Under

Harlow government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have know." Id. at 818. In their efforts to administer the doctrine of qualified immunity, the courts seek to achieve a balance "between the interests in vindication of citizen's constitutional rights and in public officials' effective performance of their duties." Davis v. Scherer, 468 U.S. 183, 195 (1984). For this reason it has become necessary in each instance to strike a balance between those circumstances that are understood to violate a clearly established right and the opposing tension toward definition of the violation by alleging broad, abstract rights.

> The contours of the right must be sufficiently clear that a reasonable official would

> understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citations omitted).

The first inquiry for the Court in this action is to isolate the "precise constitutional violation[s]" that form the basis of the plaintiffs' claims against the defendants. Graham v. Connor, _____ U.S. _____ 109 S. Ct. 1865, 1870 (1989). The constitutional claims of the plaintiffs, reflected in the complaint, are based on the first, fifth and fourteenth amendments.

1. Equal Protection

The Tenth Circuit has held that gender-based discrimination in the form of sexual harassment, when committed by individuals acting under the color of state

law, deprives the person so harassed of her fourteenth amendment right to equal protection of the laws. Starrett v. Wadley, 876 F.2d 808, 814 (10th Cir. 1989). That holding is consistent with those of the other circuit courts that have addressed the issue. Id. and cases cited therein. The scope of the plaintiffs' equal protection rights was discussed by the Seventh Circuit.

> The Supreme Court and this court have held that the equal protection clause contains a 'federal constitutional right to be free from gender discrimination' that does not 'serve important governmental objectives' and is not 'substantially related to those objectives.' Davis v. Passman, 442 U.S. 228, 234-35, 99 S.Ct. 2264, 2271, 60 L.Ed.2d 846 (1979) (quoted); Huebschen v. Dept. of Health and Social Services, 716 F.2d 1167, 1171 (7th Cir. 1983). All district courts (except the court below) that have interpreted this language as it applies to sexual harassment by a state employer have determined that such harassment constitutes sex discrimination in violation

of the equal protection clause and is actionable under § 1983.

Bohen v. City of East Chicago, Ind., 799 F.2d 1180, 1185 (7th Cir. 1986). The Court's review of the law leads to the conclusion that the plaintiffs' fourteenth amendment right to be free from sexual harassment was clearly established.

2. Freedom of Speech

The Supreme Court has recognized "that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." Connick v. Myers, 461 U.S. 138, 142 (1983) (citations omitted). The Tenth Circuit found that retaliation against an employee for the exercise of those rights is a violation of that person's first amendment right to expression. Starrett v. Wadley, 876 F.2d at 815-16. In Connick, the Court established a test for determining whether

the speech of a public employee is protected.

> Under this test, courts must determine (1) whether the plaintiff's statements can be "fairly characterized as constituting speech on a matter of public concern," and (2) whether the "interests of the [employee], as a citizen, in commenting upon matters of public concern" outweigh the "interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Connick v. Myers, 461 U.S. 138, 142, 146 (1983). See also Conaway v. Smith, 853 F.2d 789, 795-96 (10th Cir. 1988); Koch v. City of Hutchinson, 847 F.2d 1436, 1440 (10th Cir. 1988).

Starrett v. Wadley, 876 F.2d at 815.

The determination of whether an employee's speech addresses a matter of public concern is a question of law, and the decision must be based on the content, form and context of the statements made. Patkus v. Sangamon-Case Consortium, 769 F.2d 1251 (7th Cir. 1985) citing Connick, at 147-48.

Contrary to plaintiffs' assertion, the Tenth Circuit did not determine that an employee's speech concerning incidents of sexual harassment alleged matters of public concern. Starrett, 876 F.2d at 816. In that case, the defendants did not object to the district court's jury instruction on the issues, and the court chose not to address the issue. Nevertheless, the plaintiffs have provided the Court with sufficient evidence in the record from which it is able to conclude that the complaints made by the plaintiffs on different occasions raised issues of public concern with the plaintiffs' employer as well as city and county officials. (Butler Depo., Exhibit 5; Molina Depo., Exhibit 1; Taylor Depo., Exhibit 1). The complaints of each revealed improprieties on the part of law enforcement officers, at times affecting the proper functioning of a public office located at the law

enforcement center. These complaints clearly relate to matters of public importance. Conaway v. Smith, 853 F.2d 789, 796 (10th Cir. 1988).

As to the second issue, the defendants have failed to meet their burden of demonstrating that restriction of plaintiff's comments was "necessary to prevent disruption of official functions or to ensure effective performance by the employee." Conaway, 853 F.2d at 797, quoting Wren v. Spurlock, 799 F.2d 1313, 1318 (10th Cir.) cert. den., 479 U.S. 1085 (1987).

The Court concludes, as a matter of law, that the speech of the plaintiffs did involve matters of public concern, and that their first amendment right to speak about these matters is clearly established.

3. Due Process

The plaintiffs contend that their constructive discharges deprived them of a

property interest in employment with due process of law. As support for that position, they cite the Tenth Circuit's holding in Bailey v. Kirk, 777 F.2d 567 (10th Cir. 1985). In that case, the court stated:

> [T]he courts have generally held that if a plaintiff establishes that he had a protected property or liberty interest of which he was deprived without a due process hearing, his claim that he was forced to resign or was constructively discharged from employment may be actionable under § 1983.

Id. at 579 (citations omitted).

Property interests are not granted by the constitution but are creations of separate sources such as state statutes, local ordinances, established rules or mutually explicit understandings. Hullman v. Bd. of Tr. of Pratt Community College, 725 F.Supp. 1536, 1547 (D. Kan. 1989), citing Perry v. Sinderman, 408 U.S. 593, 601-02 n.7 (1972). Although there is a

presumption in the law of Wyoming that an employment relationship is "at will," the distribution of employee handbooks listing certain conduct for which an employee may be discharged implies that cause is required before discharge. Leithead v. American Colloid Co., 721 P.2d 1059, 1063 (Wyo. 1986). Thus, the law of Wyoming gives an employee in such a situation an interest in continued employment. Further, the constitutional due process right of an employee so situated, to be free from conditions constituting a constructive discharge, is clearly established.

"If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." Harlow, 457 U.S. at 818-19. The Court concludes that qualified immunity does not provide a defense for the defendants in this action.

4. Joint Powers Board

The Joint Powers Board asserts that the doctrine of qualified immunity protects it from this action. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." Mitchell v. Forsythe, 472 U.S. 511, 526 (1985). "The entitlement is an immunity from suit rather than a mere defense to liability." Id. (emphasis in original). Qualified immunity is not available to governmental entities. Owen v. City of Independence, 445 U.S. 622, 638 (1980). The defendant's contention that it may invoke qualified immunity is not supported by the law.

**C. Summary Judgment as to Defendants Mitchell, Williams and Sackett**

Contrary to the Court's initial reaction, and based upon a further review of the law and the facts in the record, the Court now finds that the plaintiffs have alleged sufficient facts to constitute a personal capacity suit against the defendants Williams and Sackett.

An individual may be sued under § 1983 in his personal capacity for actions taken by him under color of state law. "On the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." Kentucky v. Graham, 473 U.S. 159, 166 (1985) (emphasis in original). The defendants have conceded that each was acting under color of state law, and the Court has already determined that each of the plaintiffs had clearly established federal rights of which they claim to have been deprived.

The Court's next inquiry,then, is whether the plaintiffs have forwarded pleadings sufficient to create a genuine issue of material fact as to the truth of the contentions that each of the defendants did, indeed, commit the actions alleged. If there is an issue of fact regarding whether these actions occurred, summary judgment on the constitutional claims is not appropriate. Poe v. Hayden, 853 F.2d 418, 426 (6th Cir. 1988); Green v. Carlson, 826 F.2d 647, 652 (7th Cir. 1987). Viewing the pleadings on file in the light most favorable to the plaintiff, there exists more than enough evidence from which the Court may infer a genuine issue of material fact.

1. Equal Protection

Attached to the plaintiffs' opposition to this motion for summary judgment are the affidavits of Randy Feathers, Brad Jacomet and Mike

Worthington, all officers with the Worland Police Department at times relevant hereto. The affidavits each describe several repeated incidents involving both Sackett and Williams, including unwanted touching, vulgar language directed at the plaintiffs individually, sexual propositions and actions by officers towards the plaintiffs after complaints of sexual harassment had been filed. The incidences described in the affidavits are consistent with the facts alleged in the plaintiffs' pleadings and the deposition testimony provided to the Court, as discussed above, and could lead a trier of fact to conclude that the plaintiffs were subjected to sexual harassment.

2. Freedom of Speech

With regard to the freedom of speech claim, defendants argue only that the allegations in the pleadings are conclusory and vague and therefore not sufficient on

their face, and that the defendants Mitchell, Sackett and Williams did nothing that actually interfered with their exercise of free speech. Initially, the citation to the Tenth Circuit's holding in Pueblo Neighborhood Health v. Losavio, 847 F.2d 642, 650 (10th Cir. 1988), is misplaced where, as here, qualified immunity is not available to the defendants. Regardless, the Court need not apply liberal notions of notice pleading to find the pleadings in this case sufficient. The plaintiffs have alleged facts in both the pleadings and the attached deposition testimony which supports a finding that fact issues exist as to whether the defendants retaliated against the plaintiffs for reporting the alleged sexual harassment to their employer. The defendants have provided no contradictory pleadings.

And while these defendants may not have acted so as to interfere with the exercise of the plaintiffs' free speech, retaliatory actions ex post facto are nonetheless actionable under section 1983 if taken because the plaintiffs' had exercised their freedom of expression. Starrett v. Wadley, 876 F.2d at 815-16. Summary judgment is not proper on this issue.

3. Due Process

The plaintiffs allege that they have been subjected to sexual harassment of an extent and nature sufficient to force them to resign their employment. The Tenth Circuit has stated that:

> To prove a constructive discharge, a plaintiff must present sufficient evidence in establishing deliberate action on the part of an employer which makes or allows an employee's working conditions to become so difficult or intolerable that the employee has no other choice but to resign.

Irving v. Dubuque Packing Company, 689 F.2d 170 (10th Cir. 1982). Admittedly, none of the officers named in this action were employers of the plaintiffs. Their personal liability for any due process violations may nonetheless arise from actions taken by them, under color of state law, which made conditions of employment intolerable and resulted in the constructive discharge. Their liability derives not from a breach of contract of employment, but from the tortious interference with a contract which established a property interest protected by the Constitution.[1] The Court need only determine whether the plaintiffs have alleged facts which, if proven, could lead

[1]Because the plaintiffs must prove constructive discharge to establish that they have been deprived of a substantive due process right, neither their employer nor any of the officers named can be liable under § 1983 for a due process violation unless such is proven at trial. As the Court finds below, the plaintiffs have demonstrated a genuine issue of fact in this regard.

a reasonable trier of fact to conclude that the defendants caused working conditions which were repressive enough that the plaintiffs had no choice but to leave.

The defendants contend that the plaintiffs did not experience such working conditions. Their argument is based upon their view that the incidents complained of are not sufficiently egregious that a reasonable person would view them as intolerable. As the Court finds below, the very nature of this argument raises issues of fact for the fact-finder.

4. Tortious Interference with Contract

The defendants contend that the plaintiffs failed to file notice of this claim pursuant to Wyoming law. The Court finds that that is not the case. Supra note 3.

To successfully prosecute a claim for tortious interference with a contract, the

plaintiffs will be required to demonstrate the following elements:

> (1) [T]he existence of a valid contractual relationship;
>
> (2) knowledge of the relationship on the part of the interferer;
>
> (3) intentional or improper interference inducing or causing a breach of [sic] termination of the relationship, and
>
> (4) resultant damage to the party whose relationship has been disrupted.

Dynan v. Rocky Mountain Federal S & L, 792 P.2d 631, 641 (Wyo. 1989), citing Dehnert v. Arrow Sprinklers, Inc., 705 P.2d 846, 850 (Wyo. 1985). The Wyoming Supreme Court has used these factors to analyze claims of alleged interference with employment contracts. See, e.g., Davenport v. Epperly, 744 P.2d 1110, 1114 (Wyo. 1987).[2]

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[2]The Court has not yet addressed whether a co-employee or agent of an employer may be liable for this tort. "Were the issue directly posed, [however,] reason dictates that an action of wrongful interference directed against an employee or an agent of one of the parties to the contract must merge into any action for breach of the contract because the act of the agent must be

In the employment context, "[t]he crucial facts that must be shown by [plaintiffs] to be in dispute must relate to whether or not [defendants] intentionally and improperly interfered with the performance of a contract between [plaintiffs] and [their] employer by inducing or otherwise causing the employer not to perform the contract." Id. The facts presented above more than adequately meet each of these elements. Each of the plaintiffs has alleged, and provided affidavits which state, that each of the defendants acted intentionally and improperly, and that the result of such actions was a constructive discharge in violation of their implied contract of employment with the Board. Conclusory statements by the defendants that such was

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attributed to the principal." Dynan, 792 P.2d at 641. This Court is not faced with this issue, as none of the defendants has been alleged to have been acting as an agent of the Board, the plaintiffs' employer.

not the case are not adequate to establish that no material facts are in dispute.

**D. Summary Judgment as to Defendants Seghetti and Tolley**

While the threshold determinations have already been made, that there was a clearly established law governing the conduct of the officers in question which a reasonable official knew or should have known, and that whether the officer's conduct violated that law is a question of material fact, there remains another hurdle for the imposition of liability on the Washakie County Sheriff and Worland Chief of Police. This circuit has held that a sheriff is not liable under section 1983 as a supervisor unless there is an affirmative link between the alleged constitutional deprivation and "either the supervisor's 'personal participation,' his exercise of control or direction, or his failure to supervise.'" Meade, 841 F.2d at 1527,

citing Specht v. Jensen, 832 F.2d 1516, 1524 (10th Cir. 1987). The standards to apply are clearly set out.

> "A supervisor is not liable under section 1983 unless an 'affirmative link' exists between the [constitutional] deprivation and either the supervisor's 'personal participation, his exercise of control or direction, or his failure to supervise.'" Specht v. Jensen, 832 F.2d 1516, 1524 (10th Cir. 1987). . . . To be liable, a superior must have "participated or acquiesced in the constitutional deprivations of which complaint is made." Kite v. Kelley, 546 F.2d 334, 337 (10th Cir. 1976). A supervisor or municipality may be held liable where there is essentially a complete failure to train, or training that is so reckless or grossly negligent that future misconduct is almost inevitable. Hays v. Jefferson County, 668 F.2d 869, 873-74 (6th Cir. 1982).

Meade, 841 F.2d at 1528.

The Supreme Court held in Rizzo v. Goode, 423 U.S. 362, 371 (1976), that supervisors of police officers were not liable under section 1983 for the unconstitutional acts of those officers

unless the plaintiff could show such an "affirmative link" between the conduct which deprived the plaintiff of constitutional rights and the supervisors' authorization or approval of those acts.

An affirmative link may be established by showing a toleration or condonation of the sexual harassment by the officers. The plaintiffs must demonstrate that the officials "at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." Boren by & through Boren v. City of Colo. Springs, 624 F.Supp. 474, 482 (D.Colo. 1985).

> The Tenth Circuit has interpreted the "affirmative link" requirement of Rizzo to mean that "before a superior may be held for the acts of an inferior, the superior, expressly or otherwise, must have participated or acquiesced in the constitutional deprivation of which complaint is made." Kite [v. Kelley, 546 F.2d 334, 337 (10th Cir. 1976)]. In McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979), the

> Tenth Circuit extended the acquiescence theory and held that "when the defendant was in a position of responsibility, knew or should have known of the misconduct, and yet failed to act to prevent future harm," liability under section 1983 would accrue. Thus, for supervisory inaction to form the basis of section 1983 liability, the plaintiff must establish either (1) an official policy or custom which results in constitutional violations, or (2) conduct by officials exhibiting acquiescence in unconstitutional actions.

Kendel v. Orr, 628 F.Supp. 326, 328 (D. Kan. 1985).

The Court finds that the plaintiffs have alleged sufficient facts to establish a genuine issue of material fact on this issue. The allegations of the plaintiffs are that the sexual harassment became so widespread as to be "common knowledge," and that the sheriff and the chief either knew or should have known that it was occurring. (Butler Depo., at 26-27; Affidavits of Feathers, Jacomet and Worthington). It

became so prevalent and persistent, plaintiffs claim, that it constituted a custom within dispatch. Reports of the allegations were made, albeit informally at times, to the chief. As well, both the sheriff and chief were members of the Joint Powers Board, which was informed of the alleged conduct.

The pleadings of the plaintiffs demonstrate genuine issues of material fact as to whether the chief and the sheriff, who were in positions of responsibility, knew or should have known of the alleged sexual harassment, and yet failed to act to prevent it. Summary judgment is not appropriate on this issue.

**E. Summary Judgment as to Defendant Joint Powers Board**

Initially, the defendant JPB has raised certain defenses which are applicable only to plaintiff Butler. First, the Board had contended that Butler

failed to present claims in accordance with Wyo. Stat. § 1-39-113, which provides that no action may be brought against a Wyoming governmental entity unless the claim on which the action is based is presented to the entity within two years of the date of the alleged act. Butler presented her claim to the JPB by letter from her counsel of 8 May 1990, three years after she resigned from employment.[3] The defendant has not directed the Court to any authority suggesting that, before a claim may be brought against a governmental entity pursuant to 42 U.S.C. § 1983, that claim must first be validly presented pursuant to Wyoming statutes. The plaintiffs did not discuss this issue in their brief in

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[3]The defendant had contended that neither the Board nor the County had received notice of any of the three claims, and that the burden was on the plaintiffs to prove that they had ever filed proper notice to the Board. With the discovery of the 8 May 1990 letter to the Board and Washakie County from Ms. Jenkins, the Board has conceded this argument.

resistance to defendant's motion for summary judgment. Butler has failed to present claims against the governmental entity pursuant to state law, and those of her claims arising under state law must accordingly be dismissed. Her claims arising under federal law, however, are not subject to the claims requirement.

All defendants argue further that Butler has declared bankruptcy, yet failed to list this cause of action as an asset in the bankruptcy estate. Defendants thus contend that Butler is not a real party in interest and her claims should be dismissed. The plaintiff concedes that she may not be the real party in interest, and asks the Court to permit the trustee in bankruptcy to pursue the cause of action or abandon it. Provided the bankruptcy court permits Butler to reopen her bankruptcy estate and the trustee to pursue the cause of action, the trustee will be allowed to

be substituted for the present plaintiff. The contention of the defendants, that the plaintiff's prior bankruptcy proceedings should judicially estop her form asserting this claim, does not apply to an action which has not been brought against a creditor of the plaintiff.

1. Tortious Interference with a Contract

The Board cites Board of Trustees of Weston County School District No. 1 v. Holso, 584 P.2d 1007 (Wyo. 1978), reh'g denied, 587 P.2d 203, for the proposition that a cause of action for tortious interference with a contract may only be maintained against one who is not a party to the contract. JPB was, of course, a party to the employment contract. Plaintiffs do not disagree and have not maintained this cause of action against the defendant, JPB.

2. Breach of Implied Covenant of Good Faith and Fair Dealing

Implied covenants of good faith and fair dealing have been rejected by the Wyoming Supreme Court in at-will employment contracts, Nelson v. Crimson Enterprises, Inc., 777 P.2d 73 (Wyo. 1989), and in cases brought pursuant to the teacher tenure laws of the state. Leonard v. Converse County School District No. 2, 788 P.2d 1119,. 1122 (Wyo. 1990). The teacher tenure doctrine has been extended to public employees within a school district, who work on an automatically renewed year-to-year contract. Ware v. Converse County School District No. 2, 789 P.2d 872, 875 (Wyo. 1990). While the plaintiffs point out that the tort of first party bad faith has been recognized in the context of an insurance contract in McCullough v. Golden Rule Insurance Co., 789 P.2d 855 (Wyo. 1990), they have been unable to direct the Court to authority that demonstrates that Wyoming has adopted or is willing to adopt the

doctrine in cases of this nature, and the Court will not do so without direction. The plaintiffs' claim for breach of the covenant of good faith and fair dealing should be dismissed.

3. Breach of Contract

Plaintiffs DeSomber and Molina assert that provisions of their contract of employment with the Board impose a duty upon the employer to provide a work environment free of sexual harassment. The plaintiffs allege that the employment manual which governed their employment prohibited sexual harassment and discrimination. Thus, the plaintiffs contend, the JPB breached their contracts when information about sexual harassment occurring in the workplace was brought to the attention of JPB and nothing was done to protect the employees.

Plaintiffs further submit that the Board was informed when plaintiff Butler's

attorney sent each board member a copy of a letter informing them of incidents of sexual harassment. The Board took no steps to investigate the validity of the allegations or to determine whether the chief of police was investigating Butler's claim. (Hanify Depo., at 15-16). Nor did the Board attempt to speak to Butler about her complaint. (Hanify Depo., at 28; Butler Depo., at 104). The Board took the view that it was not responsible for its employees. (Hanify Depo., at 14). The Board did not investigate Molina's complaints. (Schmeltzer Depo., at 28). Even after the JPB took action in the form of a memorandum regarding sexual harassment, it did not investigate when it received additional complaints from both DeSomber and Molina. (Taylor Depo., at 41; Schmeltzer Depo., at 29). The Court concludes that there are issues of fact as to whether the JPB has breached the

contract of employment by failing to investigate the complaints of the plaintiffs and to act to protect plaintiffs as required by the provisions of the contract of employment. These issues preclude the granting of summary judgment.

4. Section 1983 Claims

42 U.S. C. § 1983 provides relief where defendants, acting under color of state law, deprive an individual of her constitutional rights, which include the right to be free of sex-based discrimination. Scott v. City of Overland park, 595 F.Supp. 520, 529 (D. Kan. 1984). As the Court has previously held, sexual harassment can violate the fourteenth amendment right to equal protection of the laws. Starrett v. Wadley, 876 F.2d at 814. The Supreme Court has held that while Congress intended for state entities to be included in those "persons" to whom 42 U.S. C. § 1983 applies, they may not be held

liable on the basis of respondeat superior. Monell v. New York Dept. of Social Services, 749 F.2d 1423 (10th Cir. 1984). A state entity may be held liable under that section for "acts which the municipality has officially sanctioned or ordered." Pembaur v. Cincinnati, 475 U.S. 469, 480 (1986). Thus, the plaintiff may establish a prima facie case by demonstrating an unconstitutional policy instituted by the Joint Powers Board. City of St. Louis v. Prapotnick, 485 U.S. 112, 128 (1988). In defining the type of "policy" required, the Supreme Court has said it implies a course of action taken by the municipality which was consciously chosen from among various alternatives. Oklahoma City v. Tuttle, 471 U.S. 808 (1985). That is, the burden is one of proving that the policymakers involved, here the Joint Powers Board, deliberately chose the particular policy, or lack

thereof, which was the cause of plaintiffs' injuries. Id. at 823. Merely demonstrating that policymakers have discretion in the discharge of a particular duty will not subject them to liability for § 1983 purposes. Pembaur, 475 U.S. at 482-83. Section 1983, however, "also authorizes suit 'for constitutional deprivation visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels.'" Prapotnick, 485 U.S. at 121 (citing Monell, 431 U.S. at 190-91).

To survive summary judgment on this complaint, the plaintiff need not prove that the policymakers involved were intertwined with the City of Worland or Washakie County in order to find liability. Nor would the imposition of § 1983 liability in this case require the application of the doctrine of respondeat

superior. The Joint Powers Board is not the employer of the perpetrators of the sexual harassment, but the employer of the persons who were harassed. The allegation here is not that the Board should be liable for the alleged constitutional viclations because it instituted policies which allowed its employees to commit acts which deprived others of their constitutional rights. The plaintiffs are asserting that the Board, as the direct employer of the plaintiffs, had a legal duty to protect its employees from sexual harassment perpetrated by other persons, who, although not employees of the Board, were known to be in the facility which was under the control of the Board.

> It is true that personal participation is not the only predicate for § 1983 liability. If a defendant sets in motion, by omitting to do that which he is legally required to do, a series of acts by others that the defendant reasonably should know would cause the others to inflict

injury, the defendant may be held liable.

Cook v. Housewright, 611 F.Sup. 828, 830 (D. Nev. 1985). The Board is legally required to provide a workplace free of sexual harassment, and if it failed to do so, as a result of a policy or custom, it can be liable for the constitutional deprivation which was a result thereof.

The plaintiffs need to allege, therefore, that the actions of the Board in failing to protect their rights were pursuant to a policy or custom of the Board. As the Supreme Court has held, municipal liability need not be predicated solely on formal municipal policies or laws. Decisions of the official policy maker to act unlawfully provide a basis for liability pursuant to section 1983. Pembaur, 475 U.S. at 483 n.12. The Court finds that the plaintiffs have fulfilled their burden of demonstrating a factual

issue in this regard. They allege that the Board was their employer; that the Board knew or should have known of the harassment; that the Board was in sole and complete control of the communications facility in which they worked; and that nothing was done to remedy the harassment. The Court finds, as a matter of law, that the Board was the official policymaker with regard to the employment decisions of the communications facility. Those decisions, pursuant to either formal policy or custom, may subject it to liability under section 1983 if a factfinder decides that the failure of the Board to take action caused the plaintiffs to be subjected to a deprivation of the right to equal protection.

The plaintiffs' § 1983 claims include the contention, arising from the alleged constructive discharges, that the plaintiffs were denied due process in their

terminations in violation of the fourteenth amendment. The Court has already determined that constructive discharge is actionable under § 1983 in cases where that discharge deprives the individual of a property interest. To survive summary judgment on the due process issue, the plaintiffs need to provide sufficient facts from which a reasonable person could conclude that the conditions under which they were working were made so difficult or intolerable that they had no choice but to resign. Irving v. Dubuque Packing Co., 689 F.2d 170 (10th Cir. 1982). Plaintiffs have made just such an allegation; that the JPB was repeatedly advised of the conditions of the employment due to sexual harassment of dispatchers by police and sheriff's officers.

In the absence of any effort on the part of the Board to protect them from continuing harassment, plaintiffs allege they were driven from their employment.

The claims include harassment which was unwelcome and consistent, and had been ongoing for several years. Even after the plaintiffs' employer was on notice of some problem, the actions continued. After official notice of reprimand had been given to Williams, the harassment did not cease, but only changed in kind. Given the factual allegations, pleadings and affidavits on file, the Court need not stretch its imagination to conclude that a factfinder could find such an environment, intolerable to the plaintiffs, may have existed.

The defendants contend that the plaintiffs have not met their burden of demonstrating the extent to which the JPB had knowledge of the conditions of employment under which the plaintiffs were working. The deposition evidence presented to the Court reveals that substantial issues of fact exist as to the extent of

knowledge of the board. That evidence shows, among other things, that as early as 1987, the Board was given rather specific knowledge of complaints of sexual harassment by dispatcher Jan Butler. As the employer of the dispatchers, the JPB had the opportunity to investigate this matter when it first came to their attention, but no action was taken. The Board has not denied that it took no action at that time, but has instead attempted to portray itself as helpless with respect to the condition of plaintiffs' employment. This is so even though the JPB was aware that its employees had alleged that they were being harassed by employees of tenants within a facility admittedly controlled by the JPB, and even though the JPB was aware that it had control over the facility in which its employees worked, and had a duty to protect them from such harassment.[4]

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[4]Not all of the Board members believed that the

While it is uncontroverted Sackett and Williams were employed by the county and city respectively and thus were not subject to any direct control imposed by the JPB, there is no dispute that Board did control the dispatch area within which its employees worked, and was in a position to take various actions that would impact upon any conditions of sexual harassment within that workplace.[5] See, Bohen v. City of East Chicago, 799 F.2d at 1188-89.[6]

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Board had a duty to protect its employees from sexual harassment. Mike Hanify, chairman of the JPB at the time Jan Butler's complaint to them was filed, stated that, until the Board knew that something was actually occurring, they had no duty to protect or to investigate.

[5]The 7 April 1985 Joint Powers Agreement entered into between Washakie County and the city of Worland provides in part that:

> The Joint Powers Board shall be solely responsible for the complete and full operation and maintenance of the Law Enforcement facility, and shall further be responsible for establishing and maintaining a budget for the cooperative undertaking herein set forth.

Joint Powers Agreement, at § 7.

[6]Hanify also stated in his deposition that the JPB was solely responsible for the complete and full

Summary judgment is not appropriate on this issue.

The defendant asserts that the retaliatory conduct alleged by the plaintiffs does not give rise to a claim under the civil rights statute, but only supports a claim under Title VII. In Starrett v. Wadley, 876 F.2d at 813-14, the Tenth Circuit addressed this precise contention in a similar factual setting.

> It is true that a right created solely under Title VII cannot serve as the basis for an independent remedy under Section 1983, lest Congress' prescribed remedies under Title VII be undermined. . . . However, that principal does not help the [defendant] here because plaintiffs' Section 1983 claim is not predicated upon a violation of Title VII, but rather upon a violation of the First, [Fifth], and Fourteenth Amendments. If a plaintiff can show a constitutional violation by someone acting under color of state law, then the plaintiff has a cause of action under Section

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operation of the law enforcement communications facility.

> 1983,. regardless of Title VII's concurrent application.

Id. (citations and footnote omitted).

Defendants' motion for summary judgment to dismiss plaintiffs' claims based upon equal protection and due process must be denied.

Finally, with regard to their constitutional third claim against this defendant, the plaintiffs assert JPB failed to act when notified of plaintiffs' complaints of sexual harassment or failed to take appropriate action. This, the plaintiffs contend, led to continuing harassing conduct against them. Plaintiffs assert that the purpose of the inaction of the defendant was to stifle their exercise of first amendment rights, and in retaliation for the same. Like the allegations of sexual harassment, the Board was explicitly made aware of the retaliatory conduct at their 27 November

1989 meeting. Though aware of these allegations, the Board took no action.

The Board argues that the speech does not meet the requirements for protected speech, and that no decision to terminate the plaintiffs was ever made. The first amendment rights of the plaintiffs were evaluated above under the two-part test enunciated by the Supreme Court in Connick v. Myers, 461 U.S. 138 (1983), and the Court concluded that the complaints of the plaintiffs were issues of public concern and that there was no evidence of a legitimate governmental reason to restrict it.

While the plaintiffs have provided the Court with no facts which suggest any conduct on behalf of the Board which was in retaliation for their exercise of their speech, nor that the Board took any actions to restrict that exercise, this claim is akin to the above constitutional claims.

No decision to terminate the plaintiffs is required to prove retaliation.

## III. CONCLUSION

ACCORDINGLY IT IS ORDERED that defendants' claims of qualified immunity are DENIED;

IT IS FURTHER ORDERED that the motion of defendant Joint Powers Board for summary judgment as to the claims asserted by the plaintiff Janice Butler based upon breach of contract and breach of implied covenant of good faith and fair dealing should be and is GRANTED;

IT IS FURTHER ORDERED that the motion of defendant Joint Powers Board for summary judgment as to claims asserted by the plaintiffs based upon breach of the implied covenant of good faith and fair dealing, should be and is GRANTED;

IT IS FURTHER ORDERED that the motion of defendant Joint Powers Board for summary judgment as to claims asserted by the

plaintiffs based upon equal protection, due process and free speech, and as to the claims asserted by the plaintiffs Melinda Molina and Beverly DeSomber based upon breach of contract, should be and is DENIED;

IT IS FURTHER ORDERED that the motion of defendants Williams, Sackett and Mitchell for summary judgment as to claims asserted by the plaintiffs based upon equal protection, due process, freedom of speech, and tortious interference with contract, should be and is DENIED; and

IT IS FURTHER ORDERED that the motion of defendants Seghetti and Tolley for summary judgment as to claims asserted by the plaintiffs based upon equal protection, due process, freedom of speech, and tortious interference with contract, should be and is DENIED;

DATED this 22nd day of May, 1991.

/S/

Alan B. Johnson
United States District Judge

**APPENDIX B**

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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| | | |
|---|---|---|
| LEE WOODARD, trustee in bankruptcy of the estate of JANICE BUTLER, MELINDA MOLINA, and BEVERLY DESOMBER, | ) | |
| Plaintiffs-Appellees, | ) | |
| v. | ) | No.91-8034 |
| THE CITY OF WORLAND, WYOMING-WASHAKIE COUNTY, WYOMING JOINT POWERS BOARD, | ) | |
| Defendants, | ) | |
| and | ) | |
| RALPH SEGHETTI, personally and in his capacity as Sheriff of Washakie County; ALLEN TOLLEY, personally and in his capacity as Chief of Police for the City of Worland; ANDY WILLIAMS, personally and in his capacity as an officer for the City of Worland Police Department; R.D. SACKETT, personally and in his capacity as Under-sheriff for Washakie | ) | |

County; and GARY MITCHELL, personally and in his capacity as a Sergeant with the Washakie County Sheriff's Department,

Defendants-Appellants.

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Appeal from the United States District Court for the District of Wyoming
(D.C. No. 90-111J)

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Terry L. Armitage, Senior Assistant Attorney General, State of Wyoming, Cheyenne, Wyoming for Defendants-Appellants.

Kathryn A. Jenkins, of Kline & Jenkins, Cheyenne, Wyoming for Plaintiffs-Appellees.

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Before EBEL, Circuit Judge, McWILLIAMS, Senior Circuit Judge,* and HUNTER, Senior District Judge.**

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EBEL, Circuit Judge.

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* The Honorable Robert H. McWilliams could not be present at oral argument due to inclement weather, but listened to a recording of the argument.

** The Honorable Elmo b. Hunter, Senior District Judge of the United States District Court for the Western District of Missouri, sitting by designation.

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This is an appeal from a denial of the Defendants-Appellants' motion for summary judgment on the ground of qualified immunity in a suit under 42 U.S. C. § 1983. We affirm in part and reverse in part.

FACTS

The City of Worland, Wyoming Washakie County, Wyoming Joint Powers Board (the "JPB") is a joint communications facility for the Worland Police Department and the Washakie County Sheriff's Department. The three Plaintiffs were dispatchers for the JPB since 1985. Their job entailed dispatching police and sheriff's officers.

While at work, the Plaintiffs allege that they were subjected to sexual harassment by Defendant Williams, a police officer, and Defendant Sackett, an undersheriff (collectively, the

"Officers").[1] Specifically, the Plaintiffs allege that the Officers touched them offensively and made offensive comments toward them. The Plaintiffs further allege that Defendant Tolley, the Chief of Police, and Defendant Seghetti, the Sheriff (collectively, the "Supervisors"),[2] knew about this sexual harassment and nevertheless failed to curb it. When Plaintiffs Molina and Butler formally

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[1] Williams and Sackett were not employees of JPB, but rather were employed by the City of Worland police department and the Washakie County sheriff's office, respectively. Accordingly, they were neither the plaintiffs' supervisors nor their co-employees. Rather, the plaintiffs, as employees of JPB, merely rendered dispatch services to the police and sheriff officers, including Williams and Sackett.

[2] We refer to Sheriff Seghetti and Police Chief Tolley collectively as the "Supervisors." We understand that technically the Plaintiffs worked for the JPB, as opposed to working for the police or sheriff's department. However, the Police Chief and Sheriff were ex officio voting members of the JPB. As such, they exercised authority over the Plaintiffs and assumed responsibility for their working conditions. Moreover, the Police Chief and Sheriff exercised direct supervisory authority over the Officers. Tolley and Seghetti also worked in the JPB facility. Accordingly, we refer to these Defendants, and treat them, as "Supervisors."

complained about this harassment, they alleged that the Defendants[3] retaliated against them for their complaints. The allegations of each plaintiff are discussed in more detail below.

A. Butler

Plaintiff Butler testified in her deposition that in December 1985 she was driving in a patrol car with Williams when he stopped the car and reached over to pull her toward him. Butler objected and Williams ceased his advance. She reported this incident to one of the other officers but asked him not to pass it on to the supervisors or higher authorities. Butler also testified that Williams "was just always putting his hands like on my shoulders, come up behind me and pretend he was masturbating on the back of my chair or

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[3] Defendant Mitchell was sued largely because his suggestions to dismantle the JPB were perceived to be retaliation for complaints filed the plaintiffs.

around my neck. He would pinch me when he walked past or pat my bottom passing in the hallways." Butler Depo. at 20, in App. of Defendants/Appellants. Several other colleagues testified that they overheard Williams making explicit sexual overtures to Butler.

Butler stated that Sackett was "always coming in giving you a neck massage or trying to look down your shirt when you're sitting down'" Id. at 22. Butler testified that she told Sackett this contact was unwelcome.

On March 11, 1987, Butler's attorney wrote a letter to the Worland City Attorney complaining about "physical touchings and verbal abuse" that Butler had received from Williams. However, there is no indication that any of the Supervisors were specifically made aware of Sackett's conduct. On March 20, 1987, the City Attorney wrote back requesting that Butler

file a formal complaint against Williams so that the City could take action against him. That same night the City adopted a resolution that sexual harassment would constitute cause for termination. Butler did not file a formal complaint until two months later, and by that time she had resigned from the JPB. The Worland Police Commission scheduled a hearing on her complaint for June 1987. Butler, who had moved to New York, received notice of the hearing but did not appear. In the absence of a complaining witness, no final action was taken with regard to these allegations.

B. Molina

Plaintiff Molina testified in her deposition that Williams would frequently make offensive and explicit sexual comments to her, including invitations for sex. Molina also testified that Williams "would grab her around the neck . . . [w]ith a hand" and "lean up real close" to her while

she was sitting. Molina Depo. at 20, in App. of Defendants/Appellants. Molina also testified that on August 22, 1989, Williams blew up at her and cursed her profanely because he thought she had misplaced a bill. She was distraught at the lack of respect indicated by this blow-up, but she did not view this incident as sexual harassment.

Molina stated that Sackett would also make sexual remarks to her and would sometimes rub her neck. It is unclear whether Molina told either Williams or Sackett that their behavior was unwelcome.

On August 24, 1989, Molina sent a letter to the City of Worland against Williams, complaining both about the August 22, 1989 blow-up and about ongoing verbal abuse and sexual harassment from Williams, and suggesting that other dispatchers may also have suffered similar abuse. There is no indication that Molina complained about

Sackett's conduct toward her. In response to her complaint about Williams, a letter of reprimand dated September 1989 was placed in Williams' file and a psychological evaluation was ordered on Williams. Additionally, on December 1, 1989, the JPB put out a memorandum to "All Personnel," warning that "improper language and suggestion of a sexual nature . . . will not be permitted and appropriate steps will be instituted to correct the situation should it be found to be occurring in the future." DeSomber Depo. Ex. 1, in App. of Defendants/Appellants. After Williams was reprimanded, his sexually harassing conduct toward Molina ceased.

However, Molina testified that after she issued her complaint about Williams to the City of Worland that Williams would "stare at [me] and try to intimidate [me]. . . .When I asked him if I could help him he would say no, and then just continue to

stare." Molina Depo. at 43, in App. of Defendants/Appellants. Apparently, various conversations would stop when Molina walked into the room, and occasionally various parties would engage in hushed conversations in which she would overhear only the words "sexual harassment." JPB responded further by precluding police and sheriff officers from entering the area where the dispatchers sat unless they had a need to do so. Molina took this to be a further sign of retaliation because it had the effect of reducing her contact with some of the officers who were friendly to her. In May 1990 Molina resigned. She testified that she left because of the work environment at JPB, although she also joined her husband who had obtained a job in Laramie.

C. DeSomber

Plaintiff DeSomber testified on deposition that she also was a victim of

Williams' conduct of pretending to masturbate behind her, and that she too was a recipient of his explicit sexual remarks and requests for sex. However, she states that she never complained to a supervisor about his conduct.

DeSomber testified as to Sackett that once he asked her "something about going out back or 'You want to mess around?'" Id. at 48. She responded with a strongly worded no. She also alleges that on one occasion Sackett flagged her car down, apparently when she was off duty, and asked "May I kiss you?" Id. at 50. She said no. DeSomber admitted to having dated Sackett at one point, although not at this time. DeSomber acknowledged telling sexual jokes to the officers, and once at work in response to a sexual comment she bit Mitchell on his buttock.

Although DeSomber never complained about either Williams' or Sackett's alleged

sexual harassment of her, she openly supported Molina's complaint. DeSomber testified that the Defendants and their supporters retaliated against her for supporting Molina as follows: Seghetti initiated a drug investigation against all the dispatchers; once she was stopped and charged with going 53 in a 30 mile zone and was asked where she had been; she was no longer invited to attend JPB meetings; Mitchell proposed disbanding the JPB, which she felt would be disadvantageous to her; and contact between the officers and the dispatchers was restricted following Molina's complaint. In May 1990 DeSomber resigned.

The Plaintiffs asserted the following claims under 42 U.S.C. § 1983: (1) the Officers' sexual harassment and the Superiors' failure to stop it violated their right to equal protection under the Fourteenth Amendment; (2) the harassment

and the retaliation that followed their reporting of the harassment (or, in DeSomber's case, her support for Molina in reporting the harassment) was so intolerable as to constitute a constructive discharge in violation of their due process rights under the Fourteenth Amendment; and (3) the retaliation they received for speaking out against the sexual harassment violated their rights under the First Amendment.

After discovery, the Defendants moved for summary judgment on the ground of qualified immunity. The district court denied the Defendants' motion and the Defendants, with the exception of the JPB,[4] filed this interlocutory appeal pursuant to Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

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[4] The District Court held that under Owen v. City of Independence, 445 U.S. 622, 650 (1980), a municipal entity cannot claim qualified immunity. That ruling was not appealed.

## DISCUSSION

We limit our review to the question of whether the district court properly denied the Defendants' motion for qualified immunity. See Snell v. Tunnell, 920 F.2d 673, 676 (10th Cir. 1990), cert. denied, 111 S. Ct. 1622 (1991). Under the qualified immunity doctrine, government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (citations omitted).

The procedure for analyzing a claim of qualified immunity is as follows. First, the defendant must raise the defense of qualified immunity. Once the defendant has adequately raised the defense, the plaintiff must show that the law was clearly established when the alleged

violation occurred and come forward with facts or allegations sufficient to show that the official violated the clearly established law. Then the defendant assumes the normal summary judgment burden of establishing that no material facts that would defeat his claim for qualified immunity remain in dispute. Dixon v. Richer, 922 F.2d 1456 (10th Cir. 1991); Powell v. Mikulecky, 891 F.2d 1454, 1457 (10th Cir. 1989).

Under this framework, we will address each of the defendants' qualified immunity claims with respect to each of the Plaintiffs' allegations.

## I. Equal Protection Claim for Sexual Harassment

### A. The Supervisors

The law was not clearly established in our Circuit until May of 1989 that sexual harassment under color of state law violates the Equal Protection Clause.

Because Butler had quit by that time, all the individual Defendants, including the Supervisors, are entitled to qualified immunity with regard to the Equal Protection claim asserted by Plaintiff Butler. Additionally, we conclude that Plaintiffs Molina and DeSomber have failed to show that the Supervisors' conduct after May of 1989 violated their Equal Protection rights. Thus, the Supervisors are entitled to qualified immunity with respect to all the Plaintiffs' Equal Protection claims.

**1. Butler**

Plaintiff Butler quit in May 1987. We are aware of only one circuit and several district courts that had held prior to May 1987 that sexual harassment was actionable under the Equal Protection Clause. See Bohen v. City of East Chicago, 799 F.2d 1180, 1185-87 (7th Cir. 1986), and cases cited therein. We recently held that "[o]rdinarily, in order for the law to be

clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992). (citation omitted); see also Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees § 9.20, at 537 (2d ed. 1991) ("Normally, a single recent case from one circuit is not sufficient to make the law clearly established in another circuit. Also, a district court decision will not ordinarily '"clearly establish" the law even of its own circuit, much less that of other circuits.'") (footnotes and citations omitted). In Medina, we refused to conclude that the law was clearly established by a single Seventh Circuit opinion and a district court opinion from another circuit. Medina, 960 F.2d at 1498

& n.6. Similarly, we do not believe that Bohen and the several district court cases cited therein clearly established that sexual harassment was actionable under the Equal Protection Clause in this circuit prior to May 1987. Accordingly, the district court erred in denying the Supervisors qualified immunity with respect to Butler's Equal Protection claim.

The Plaintiffs direct our attention to Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990), in which the Third Circuit held that it was clearly established by 1986 that sexual harassment by a state employer, or a state employer's conscious failure to curb such harassment, was actionable under the Equal Protection Clause. Id. at 1479. Although Andrews cites several cases on discrimination, it cites only Bohen for the proposition that it was established by 1986 that sexual harassment could amount to sex

discrimination under the Equal Protection Clause. See id. at 1478, 1479. To the extent that Andrews relies on Bohen alone in finding that the law was clearly established, Medina precludes us from reaching a similar conclusion.

Alternatively, Andrews may be read as holding that because sexual discrimination was clearly actionable in 1986, it was clearly established that sexual harassment, a form of discrimination, was also actionable. On this reading as well, we respectfully disagree with Andrews. In Anderson v. Creighton, 483 U.S. 635 (1987), the Supreme Court admonished against looking at such a general right as the right to be free of sex discrimination for purposes of the "clearly established" test.

> The operation of [the "clearly established"] standard...depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly

established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of Harlow. ...Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages,"...It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say than an official action is protected by qualified immunity unless the very action in question has previously been held unlawful ... but it is to

> say that in light of pre-existing law the unlawfulness must be apparent.

Id. at 639-40 (citations and footnotes omitted).

Our circuit squarely joined Bohen in May of 1989 when we decided Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989). In that case we unequivocally held that "sexual harassment ... can violate the Fourteenth Amendment right to equal protection of the laws." Id. at 814. However, at that time only one other circuit had explicitly joined Bohen,[5] and we therefore do not believe the law on this matter was clearly established in the Tenth Circuit until Starrett v. Wadley.

**2. Plaintiffs Molina and DeSomber**

Molina and DeSomber assert Equal Protection claims against the Supervisors

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[5] The Eighth Circuit implicitly joined Bohen in Headley v. Bacon, 828 F.2d 1272, 1274-75 (8th Cir. 1987), but that decision was not issued until September of 1987, which was after Butler had resigned.

for sexual harassment for a time period that continued after Starrett v. Wadley was decided in May 1989 until at least September 1989.[6] However, they failed to provide any specific evidence of conduct by the Supervisors amounting to an actionable conscious failure to curb the Officers' sexual harassment after May 1989.[7]

Although Molina and DeSomber make generalized allegations of continuing sexual harassment and although they stated that the harassment was commonly known throughout the office, they were unable to respond to the Defendants' motion for summary judgment with evidence of specific

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[6] Plaintiffs Molina and DeSomber quit in May 1990. However, they testified that after Williams was reprimanded in September 1989 for his conduct toward Molina, they suffered primarily retribution for the complaint, as opposed to sexual harassment.

[7] Even before May of 1989 the evidence was that the Supervisors had scheduled a hearing to deal with Butler's complaint promptly after receiving her complaint and there was no indication that the hearing would not have been effective had Butler showed up.

acts of sexual harassment occurring after May 1989 that the Supervisors knew about and tolerated. The vague, non-time-specific, and conclusory allegations that were made against the Supervisors were not sufficient to put at issue whether the Supervisors' conduct violated clearly established rights. See Anderson, 483 U.S. at 639-40. To the contrary, when Molina finally did complain to the Supervisors about sexual harassment, the response of the Supervisors was prompt, unequivocal, and effective.[8] They put a letter in Williams' file reprimanding him, and his sexual harassment ceased. JPB followed up this action with a communication to all personnel stating that sexual harassment

[8] In September 1989 Molina also filed a complaint with the Wyoming Fair Employment Commission. However, since Williams ceased his harassment the Commission put that case on hold, and Molina agreed no further action was needed.

would not be tolerated.[9] We therefore hold that Molina and DeSomber have failed to present evidence of direct involvement by the Supervisors in the sexual harassment or of knowledge and acquiescence by the Supervisors of the sexual harassment. Thus, it was error not to grant the Supervisors' motion for summary judgment based on qualified immunity with regard to the Equal Protection claim.

Plaintiffs suggest that the Supervisors have liability under § 1983 if they merely "should have known" that sexual harassment was going on and failed to stop it, even if it was not established that the Supervisors had actual knowledge of such sexual harassment. For this proposition they cite Meade v. Grubbs, 841 F.2d 1512, 1528 (10th Cir. 1988). Although Meade does

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[9] The district court noted that the JPB employment manual prohibited sexual harassment and discrimination.

use such language in the opinion, that was not the holding in Meade. The holding was that a complaint states a claim under § 1983 if it alleges that a sheriff was "deliberately indifferent" to constitutional violations by his deputies. Id. at 1528. However, if a plaintiff merely shows that a supervisor "should have known" that a subordinate was violating someone's constitutional rights and it is not established that the supervisor actually had such knowledge,[10] the plaintiff will not have established a deliberate, intentional act by the supervisor to violate constitutional rights. At most, the plaintiff will have established only that the supervisor was negligent in not observing what he should have seen. The Supreme Court has made it

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[10] Of course, actual knowledge by the supervisor may be proven circumstantially, but it is actual knowledge that must be alleged and proved.

clear that liability under § 1983 must be predicated upon a "deliberate" deprivation of constitutional rights by the defendant. City of Canton v. Harris, 489 U.S. 378, 389 (1989); Daniels v. Williams, 474 U.S. 327, 331 (1986); Davidson v. Cannon, 474 U.S. 344, 347 (1986). It cannot be predicated upon negligence. Daniels, 474 U.S. at 330, Archuleta v. McShan, 897 F.2d 495, 497 (10th Cir. 1990).[11] The Supreme Court's

[11] Merely characterizing the negligence as "gross" does not change its essential character. Negligence is carelessness and gross negligence is simply gross carelessness. Neither simple nor gross negligence implies an intentional and deliberate violation of constitutional rights, and consequently neither from of negligence satisfies the scienter requirement of § 1983. In contrast, recklessness does not include an element of deliberateness--"a conscious acceptance of a known, serious risk." Archuleta v. McShan, 897 F.2d at 499 (emphasis added). As such, recklessness is generally regarded as satisfying the scienter requirement of section 1983 because it requires proof that the defendant focused upon the risk of unconstitutional conduct and deliberately assumed or acquiesced in such risk. Id. at 499. However, merely asserting that the defendant "should have known" of unconstitutional behavior on behalf of his or her subordinates without establishing an intentional, conscious, and deliberate act by the defendant participating in, or knowingly acquiescing in, the unconstitutional behavior fails to allege the requisite scienter for § 1983 liability.

explicit holding in 1989 in City of Canton of a scienter requirement for § 1983 liability negates any dicta that may have appeared in earlier cases suggesting that supervisor liability may be predicated upon negligence of any kind.

> [S]upervisor officials may be liable under section 1983 when their failure to train subordinate employees was so sever as to constitute 'deliberate indifference'
> .... Earlier decisions finding that grossly negligent training may give rise to supervisory liability are no longer good law, given the specific rejection in City of Canton v. Harris of gross negligence in favor or deliberate indifference.

Schwartz & Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees, § 7.11 at 386.

We are persuaded that the proper articulation of the test for supervisory liability under section 1983 is that set

forth by the Third Circuit in Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir. 1990), where it was stated that supervisor liability requires "allegations of personal direction or of actual knowledge and acquiescence." Id. at 1478. Indeed, in a case that preceded Meade, we used language that closely parallels the test set forth in Andrews. See Kite v. Kelley, 546 F.2d 334, 337 (10th Cir. 1976) (holding in a Bivens actions that "before a supervisor may be held for acts of an inferior, the superior...must have participated or acquiesced in the constitutional deprivations"). See also Rizzo v. Goode, 423 U.S. 362, 371 (1976) (supervisor liability requires an "affirmative link [between the supervisor and the subordinate] showing [the supervisors'] authorization or approval of such misconduct"), Greason v. Kemp, 891 F.2d 829, 336-37 (11th Cir. 1990).

**B. The Officers and Mitchell**

The Plaintiffs' Equal Protection claims against Williams and Sackett[12] for sexual harassment are more difficult because the conduct alleged against them is so offensive and unacceptable. It is possible, although we do not reach the issue on this appeal, that such conduct might give rise to liability under various state law theories. However, the Plaintiffs have two difficulties in trying to fit this claim against the Officers into a § 1983 cause of action premised on the Equal Protection Clause of the United States Constitution.

First, as noted above, it was not clearly established law in this circuit until May 1989 that sexual harassment under

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[12] The Plaintiffs did not establish that Defendant Mitchell perpetrated or consciously failed to prevent sexual harassment against them. Accordingly, we conclude that no Equal Protection claim was shown against him.

color of state law was actionable under the Equal Protection Clause. See Starrett, 876 F.2d at 814. That precludes Butler's claim against Williams and Sackett, since she had resigned by then, and it significantly limits the claims of Molina and DeSomber.

Second, Williams and Sackett were not the Plaintiffs' supervisors or employers, nor did they have control or authority over Plaintiffs. Williams and Sackett remained employees of the city police and county sheriff's offices respectively, whereas the Plaintiffs were employed by the JPB, which had a separate organization and governing board. We have been cited no case clearly holding that sexual harassment on the job by one who is not in a position of authority over the victim is actionable under the Equal Protection Clause and § 1983. To the contrary, several cases have declined to find liability under § 1983 against a co-employee for harassment when

the harassment did not involve use of state authority or position. Hughes v. Halifax County Sch. Bd., 855 F.2d 183, 186-87 (4th Cir. 1988), cert. denied, 488 U.S. 1042 (1989) (refusing to constitutionalize all torts among state co-employees, and observing that Section 1983 prohibits only "the 'misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law'") (quoting Monroe v. Pape, 365 U.S. 167, 184 (1961)); Murphy v. Chicago Transit Auth. 638 F.Supp. 464, 467-68 (N.D. Ill. 1986) (refusing to find § 1983 liability for sexual harassment among state co-workers because the sexual harassment was not related to "the powers and duties" of the defendants' jobs or to any "state authority" conferred upon the defendants); see also Dang Vang v. Vang Xiong X. Toyed, 944 F.2d 476, 479-80 (9th Cir. 1991) (upholding finding that state

employee, who was employed to find refugees suitable employment, used his government position to sexually harass the refugees, but otherwise citing with approval to Murphy.)

Typically, liability under the Equal Protection Clause for sexual harassment in the workplace is predicated upon some authority that the wrongdoer has over the victim. Otherwise, it is difficult to establish that the abusive action was perpetrated "under color of state law" rather than as an essentially private act of sexual harassment. The mere fact that all the participants were state employees or that the offending acts occurred during working hours is not enough. See Hughes, 855 F.2d at 186. Cf. Starrett, 876 F.2d at 819-20 (holding that a county does not have liability under § 1983 when a supervisor's acts of sexual harassment against employees were unrelated to his official position or

authority.) In Bohen, the Seventh Circuit noted:

> Sexual harassment of female employees by a state employer constitutes sex discrimination for purposes of the equal protection clause of the fourteenth amendment. Creating abusive conditions for female employees and not for male employees is discrimination.... Forcing women and not men to work in an environment of sexual harassment is no different than forcing women to work in a dirtier or more hazardous environment than men simply because they are women. Such unjustified unequal treatment is exactly the type of behavior prohibited by the equal protection clause....

Bohen, 799 F.2d at 1185 (citations omitted) (emphasis added).

Of course, if a supervisor or employer participates in or consciously acquiesces in sexual harassment by an outside third party or by co-workers, or if the employing entity has a policy or custom of allowing such sexual harassment in the workplace, the supervisor or employer may

be liable. However, here we are addressing not the liability of the supervisor or employing entity but rather the liability of a third party under § 1983 for conduct that did not rely upon or invoke state position or authority.

We do not take the occasion here to decide whether an outside third party or co-employee could ever be liable for sexual harassment under § 1983 and the Equal Protection Clause. We resolve this case simply by noting that the Officers here were not violating clearly established law under the Equal Protection Clause when they acted as they did with respect to Molina and DeSomber. Thus, it was error to deny the Officer's qualified immunity defense on this claim.

## II. Constructive Discharge

### A. The Supervisors

It has been clearly established since at least 1985 that constructive discharge

from employment as to which an employee has a protectable property or liberty interest[13] may be actionable under § 1983. See Bailey v. Kirk, 777 F.2d 567, 579 (10th Cir. 1985). Additionally, it has been clearly established since at least 1986 that constructive discharge exists when "'a reasonable [person] would view the working conditions as intolerable'" and when the "working conditions [are] so difficult that a reasonable person in the employee's position would feel compelled to resign." Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986) (applying constructive discharge in a Title VII case) (Citation omitted); see also Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982) ("[A] constructive discharge occurs when an employer deliberately makes or

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[13] There is no dispute in this case about Plaintiffs' protectable property or liberty interest in their jobs.

allows the employee's working conditions to become so intolerable that the employee has no other choice but to quit,") (emphasis added)

1. Butler

Plaintiff Butler has not established a genuine dispute of material fact as to whether her working conditions were so intolerable that a reasonable person would have been compelled to resign. Specifically, she does not establish that she took steps short of resignation that a reasonable person would have taken to make her working conditions more tolerable. Although Butler gave deposition testimony as to facts suggesting intolerable treatment at the hands of the Officers, she did not formally complain about the treatment until she quit. Indeed, after telling a colleague about Williams' most direct and threatening sexual act against her, she specifically asked that colleague

not to report it to management. Moreover, she continued to work at JPB and to have contact with Williams without filing a complaint for more than one and one-half years after that incident before resigning. Although cumulative events can ultimately cause working conditions to deteriorate to an intolerable level, Butler here had an alternative to resignation, and she knew it. She could have lodged a formal complaint with her supervisors against Williams and requested relief. Indeed, she ultimately took that step, but not until she had resigned. Thus, she never determined whether lodging a formal complaint was a reasonable alternative to resignation. The record suggests that the Supervisors were willing to take action against Williams promptly upon the filing of a formal complaint, and there is no indication that such action would not

successfully have curbed Williams' abusive behavior.

There certainly may be situations where lodging a complaint with a supervisor would be perceived by a reasonable person to be a clearly futile act, but the Plaintiffs did not present such evidence here. Constructive discharge requires considerably more proof than establishing unpleasant working conditions. Here, Butler apparently was able to work under these circumstances for several years, and there was no showing either that the situation got substantially worse just before she quit or that requesting disciplinary action against Williams would have been ineffective. Hence, on this record, Butler failed to establish a genuine dispute as to whether a reasonable person would have believed that there was no reasonable alternative to resignation. The Supervisors therefore should have been

granted qualified immunity on this claim because their conduct did not violate any clearly established law constituting constructive discharge.

2. Molina and DeSomber

However, Plaintiffs Molina and DeSomber have established a genuine dispute of fact as to whether they were constructively discharged by the Supervisors. Granted, once the Officers' alleged sexual harassment was explicitly brought to the Supervisors' attention, the Supervisors appear to have curbed such conduct. However, there was evidence in the record that both the Officers and the Supervisors engage in retributive conduct against Molina and DeSomber after Molina lodged her complaint about the sexual harassment. We have considerable doubt whether the retributive acts about which the Plaintiffs testified -- e.g., not including them in conversations, not

inviting them to meetings, laughing in conversation as they passed by, segregating the dispatchers from the police and sheriff officers, and launching a drug investigation -- were so severe and intolerable that a reasonable person would have no alternative except to resign. Molina had, after all, managed to curb the sexual harassment by lodging a complaint with the City, and there appear to have been various legal avenues open to Molina and DeSomber to challenge the retributive conduct without resigning. However, these are not matters to be decided on summary judgment. There is a material dispute of fact on this record as to whether the retributive conduct either participated in by the Supervisors or knowingly acquiesced in by the Supervisors constituted constructive discharge. Thus, the district court correctly denied summary judgment to the Supervisors on their defense of

qualified immunity with regard to the constructive discharge claim by Molina and DeSomber.

B. The Officers and Mitchell

It is not clearly established even now, and therefore it certainly was not clearly established at the time of the events in this case, that someone other than a supervisor or a person with authority or responsibility for working conditions can be held liable for constructive discharge in violation of the Due Process Clause of the Fourteenth Amendment. We are not aware of any case that has so held, and the parties cite us to none. Here, of course, the Officers were not Plaintiffs' supervisors nor even were they the Plaintiffs' co-employees. They lacked any power or authority to discharge the Plaintiffs, and they had no personal constitutional obligation to provide the Plaintiffs with any kind of due

process hearing in the event the Plaintiffs were discharged. The Plaintiffs have failed to make a showing sufficient to avoid summary judgment that the Officers violated a clearly established Due Process obligation owed to the Plaintiffs.[14]

Thus, we hold that the district court erred in denying summary judgment to the Officers and Mitchell[15] on the basis of

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[14] There was not sufficient evidence in the record other than generalized speculation that the Officers conspired with the Supervisors to create such adverse working conditions that the Plaintiffs would be forced to resign. We do not address whether the Officers might have liability under the Due Process Clause under different facts not presented by this record.

[15] Mitchell was not in a position of authority over the Plaintiffs and thus he is also entitled to qualified immunity on this claim. In addition, nothing alleged against him even remotely rises to the level of constructive discharge. He is accused of having proposed the disbanding of JPB and the reorganization of dispatcher services and of having called DeSomber a liar at a meeting. There is no indication that such reorganization ever occurred, and no one told the Plaintiffs that they would be fired or lose their jobs. Under no stretch of the facts could Mitchell be said to have acted in such a way as to make the Plaintiffs' jobs so intolerable that a reasonable person in plaintiffs' position would have concluded that she had no choice but to resign.

qualified immunity with regard to this claim.

**III. First Amendment**

A public employer may not condition employment or its incidents upon an employee's relinquishment of his or her First Amendment rights. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Childers v. Indep. Sch. Dist. No. 1 of Bryan County, 676 F.2d 1338, 1342 (10th Cir. 1982) (altered employment conditions in retaliation for valid exercise of First Amendment rights may be an unconstitutional infringement of protected activity).

In a First Amendment action against a public employer alleging retribution for speech, the court must first determine whether the employee's speech "was on a matter of public concern." Melton v. City of Oklahoma City, 879 F.2d 706, 727 (10th Cir. 1989), cert. denied, 112 S.Ct. 296 (1991). If the speech involved a matter of

public concern, the court must then balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568. "[T]he fact that [an] employee makes...statements privately to the employer rather than publicly does not eliminate the Constitution's protections...." Starrett, 876 F.2d at 816-17 n.11.

The Supreme Court has provided guidance as to what is and what is not a matter of public concern in Connick v. Myers, 461 U.S. 138 (1983). There, the Court held that speech pertaining to a governmental agency's "discharg[e] [of] its governmental responsibilities" ordinarily will be regarded as speech on a matter of public concern, while speech pertaining to

internal personnel disputes and working conditions ordinarily will not be so regarded. Id. at 148. In deciding how to classify particular speech, courts focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose. Conaway v. Smith, 853 F.2d 789, 796 (10th Cir. 1988). This is admittedly often a difficult line to draw, and it requires a court to consider the "content, form and context of a given statement, as revealed by the whole record." Connick, 461 U.S. at 147-48. Here the thrust of the Plaintiffs' speech was that they personally were being subjected to sexual harassment and they wanted it to stop. Although there were several general references in their complaints to the possibility that other women may also have been subjected to sexual harassment, no specifics were

given[16] nor was the purpose or substance of the complaints to assert that the sexual harassment prevented the JPB from properly discharging its official responsibilities. A review of the entire record makes it clear that the Plaintiffs were intending to address personal grievances that they had with Williams. See Connick, 461 U.S. at 148 (a personal employment dispute is not converted into a matter of public concern merely because an employee seeks to show that other employees may have similar complaints); Gray v. Lacke, 885 F.2d 399, 410-11 (7th Cir. 1989), cert. denied, 494 U.S. 1029 (1990) (an employee's complaint to her supervisors about sexual harassment against her was a matter of private concern

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[16] Molina's complaint was the most specific, and she noted merely that "[i]t has further come to my attention that other dispatchers have been treated with little respect in the past two weeks by Lt. Williams [sic] and have possibly suffered some of the same abuse I have in the past." Molina Depo. Ex. 1, at 2 in App. of Defendants/Appellants.

and did not state a cause of action under § 1983).

However, that is not necessarily the end of the analysis. The Supreme Court in Connick held that even speech that focuses on internal employment conditions and is made in the context of a personal dispute may be regarded as pertaining to a matter of public concern if it addresses important constitutional rights which society at large has an interest in protecting. In Connick, one question in the questionnaire distributed by the plaintiff to her co-workers asked whether assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates?" Connick, 461 U.S. at 149. The court noted that this question implicated fundamental constitutional rights prohibiting the coercion of beliefs, and it further related to an important societal interest that government service

should depend upon merit rather than political service. Id. Thus, because the substance of this question related to important societal and constitutional interests, it was held to be speech pertaining to a matter of public concern even though the context of the speech was to redress a personal grievance. Id.

However, as of the time of the alleged unconstitutional retaliation here, we are aware of no case holding that speech similar to that made by Plaintiffs pertained to a matter of public concern under the Connick test. See Starrett v. Wadley, 876 F.2d at 816 (finding it unnecessary to reach the issue); Gray v. Lacke, 885 F.2d at 411 (concluding that allegations of personal sexual harassment do not rise to the level of a public concern). Thus, we simply cannot conclude that the Supervisors' alleged response to Plaintiffs' complaints of sexual harassment

violated any clearly established rights of Plaintiffs under the First Amendment. Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992).

Plaintiffs' First Amendment claim against Williams, Sackett and Mitchell suffers from the additional defect, noted before, that they were not Plaintiffs' supervisors. We are aware of no case law clearly establishing that a non-supervisor can be liable under § 1983 for responding critically to speech made by a co-employee, much less a person who, as in this case, is not even a co-employee. Accordingly, the district court erred in denying appellants' motion for summary judgment on the basis of qualified immunity with regard to Plaintiffs' First Amendment claims.

CONCLUSION

We hold that (1) all of the Appellants are entitled to qualified immunity with respect to the Plaintiffs'

Equal Protection claims; (2) Seghetti and Tolley are entitled to qualified immunity with respect to Butler's constructive discharge claim, but they have not established qualified immunity as to the constructive discharge claims of Molina and DeSomber; Williams, Sackett and Mitchell are entitled to qualified immunity on all of the Plaintiffs' constructive discharge claims; and (3) all of the Appellants are entitled to qualified immunity as to Plaintiffs' First Amendment claims.

Accordingly, we AFFIRM in part and REVERSE in part the district court's order denying the Appellants' motion for summary judgment on the defense of qualified immunity, and we REMAND for further proceedings.

**APPENDIX C**

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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| | | |
|---|---|---|
| LEE WOODARD, trustee in bankruptcy of the estate of JANICE BUTLER, MELINDA MOLINA, and BEVERLY DESOMBER, | ) | |
| Plaintiffs-Appellees, | ) | |
| v. | ) | No.91-8034 |
| THE CITY OF WORLAND, WYOMING-WASHAKIE COUNTY, WYOMING JOINT POWERS BOARD, | ) | |
| Defendants, | ) | |
| and | ) | |
| RALPH SEGHETTI, personally and in his capacity as Sheriff of Washakie County; ALLEN TOLLEY, personally and in his capacity as Chief of Police for the City of Worland; ANDY WILLIAMS, personally and in his capacity as an officer for the City of Worland Police Department; R.D. SACKETT, personally and in his capacity as Under-sheriff for Washakie County; and GARY MITCHELL, personally and in his capacity as a | ) | |

Sergeant with the )
Washakie County Sheriff's )
Department, )
)
Defendants-Appellants. )

---

ORDER
Entered December 15, 1992

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Before McKAY, Chief Judge, McWILLIAMS, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, Circuit Judges, and HUNTER*, District Judge.

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* The Honorable Elmo B. Hunter, Senior District Judge of the United States District Court for the Western District of Missouri, sitting by designation.

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This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was

transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /S/
Patrick Fisher
Chief Deputy Chief

Supreme Court, U.S.
FILED
JUN 4 1993
OFFICE OF THE CLERK

No. 92-1508

In The

# Supreme Court of the United States

October Term, 1992

LEE WOODARD, et al.,

*Petitioners,*

v.

RALPH SEGHETTI, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Is the Tenth Circuit Court of Appeal's analysis of qualified immunity in conflict with decisions of the Supreme Court?

Does the lower court's decision that sexual harassment was not clearly established as violating the Equal Protection Clause on the facts of this case conflict with the decisions of other United States Appellate Courts?

Does the Tenth Circuit Court of Appeal's factual determination regarding constructive discharge require the Supreme Court's supervisory powers?

Does the Tenth Circuit Court of Appeal's analysis of Petitioners' First Amendment claims conflict with the decisions of other Circuits on the facts in this case?

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## STATEMENT OF THE CASE

### Course of Proceedings

Respondents' Motion for Summary Judgment based upon the affirmative defense of qualified immunity in a civil rights suit under 42 U.S.C. § 1983 was denied in United States District Court for the District of Wyoming. (Petitioners' Appendix A).

The denial of qualified immunity was appealed to the United States Court of Appeals for the Tenth Circuit. In that decision the Tenth Circuit reversed a majority of the lower court's decision. (Petitioners's Appendix B). A petition for rehearing was denied.

Petitioners then petitioned for a Writ of Certiorari in the United States Supreme Court. Respondents were requested to file a Brief in Opposition.

### Relevant Facts

Respondents incorporate by reference the statement of the facts in the Tenth Circuit opinion below. (Petitioners' Appendix B p. 66a-76a).

Respondents would ask the Court to note pursuant to Supreme Court Rule 15 that Petitioners have misstated or at least implied that certain facts were different from what they actually are. In Questions Presented by Petitioners, Question One refers to " * * * sexual harassment against female *co-workers* * * * " (emphasis added). Furthermore, in Petitioners' Question Four, Petitioners refer to " * * * sexual harassment in the *work place* * * * " (emphasis added). It cannot be emphasized enough that the Respondents who were granted qualified immunity

by the Tenth Circuit Court of Appeals were neither co-workers nor co-employees. Although the acts complained of happened at Petitioners' work place, no act involved a co-worker or a co-employee. Only persons who did not have supervisory authority or any responsibility for Petitioners' working conditions were alleged to have violated Petitioners' constitutional rights.

## SUMMARY OF ARGUMENT

Although Petitioners have set forth four separate arguments, the major underlying theme is whether or not the decision below is in conflict with the Supreme Court or the decisions of other Courts of Appeal. The United States Supreme Court has announced the proper constitutional analysis in cases regarding employment and 42 U.S.C. § 1983. The Tenth Circuit properly applied the appropriate analysis in each situation. There are no questions presented which raise a legal controversy of importance or show direct conflict. Petitioners are asking the Court to review the Tenth Circuit's decision in the same manner, but reach a different result. For this reason, the writ of certiorari should be denied.

## ARGUMENT

## NO GROUNDS EXIST FOR GRANTING CERTIORARI

### 1. The Tenth Circuit Court of Appeals properly applied the United States Supreme Court's analysis in determining that qualified immunity protected Respondents.

The Tenth Circuit properly limited its review to the question of whether or not the district court had correctly denied Respondents' Motion for summary judgment based upon qualified immunity. The court cited *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), for the proposition that under the doctrine of qualified immunity governmental officials "generally are sheltered from liability for civil damages insofar as their conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known."

The Tenth Circuit Court then set forth the procedure to be used in analyzing a claim of qualified immunity. First, the defendant must raise the defense of qualified immunity. Once that defense has been adequately raised, the plaintiff has the burden to show that the law was clearly established at the time that the alleged violation occurred, and present a factual basis sufficient to show that the officials violated clearly established law. The defendant then must meet the summary judgment burden of establishing that no material facts that would defeat a claim for qualified immunity remain in genuine dispute. The Tenth Circuit cited *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991), and *Powell v. Mikulecky*, 891 F.2d 1454, 1457 (10th Cir. 1989).

Although Petitioners state in argument that the Tenth Circuit's application of qualified immunity " * * * is in conflict with this Court's prior rulings and raises important questions of federal law * * * ", Petitioners cite no case which requires a different constitutional analysis regarding qualified immunity. In fact, Petitioners acknowledge that they are asking the Court to review "under the facts set forth above" whether Respondents are entitled to qualified immunity. Petitioners are merely asking that this Court apply the same analysis set forth in *Harlow v. Fitzgerald,* but arrive at a different conclusion.

A mere factual disagreement does not create a conflict requiring this Court to grant a Writ of Certiorari. The Tenth Circuit did not reach a decision which indicates a misapprehension of the controlling law regarding qualified immunity. *See, Florida v. Rodriguez,* 469 U.S. 1 (1984). Petitioners have not shown a conflict with the Supreme Court or with any other Circuit requiring the Supreme Court to provide guidance.

In *Ross v. Moffitt,* 417 U.S. 600 (1974), the Supreme Court granted certiorari to determine a conflict among several Circuits regarding the extent of right to counsel. The decision would have an effect on numerous cases because it defined the scope of a major constitutional right. In the present case, there is no conflict regarding the applicable law. The only possible result of a reversal by this Court would be a different factual outcome under the same legal analysis. A different decision would affect no other case. Certainly a mere factual disagreement does

not create an intolerable conflict, requiring intervention by the Supreme Court. *See, United States v. Lorenzetti*, 467 U.S. 167 (1984).

**2. The Tenth Circuit Court of Appeals' determination that sexual harassment as a violation of the Equal Protection Clause was not clearly established as applied to these facts did not conflict with decisions of other Appellate Courts.**

Petitioners argue that the Tenth Circuit's determination that the law was not clearly established in the Tenth Circuit until May of 1989 that sexual harassment violates the Equal Protection Clause is in conflict with other circuit courts. Once again, Petitioners are asking this Court to grant certiorari based on a disagreement with a factual determination. It should be noted by the Court that Petitioners make no distinction among the various Petitioners and the acts of the various Respondents or the times in which events occurred, but merely argue that in general, sexual harassment must violate equal protection.

The Tenth Circuit determined a difference between the "supervisors" and the other officers, though none were co-workers or co-employees. The Tenth Circuit also distinguished between Petitioner Butler, who quit employment in May 1987, and Petitioners Molina and DeSomber who asserted Equal Protection claims against the supervisors until approximately May, 1989. The court also found that Petitioners Molina and DeSomber "failed to provide any specific evidence of conduct by the supervisors amounting to an actionable conscious failure to

curb the officers' sexual harassment after May 1989." (Petitioners' Appendix B p. 85a).

The Tenth Circuit, in a very thoughtful and well reasoned decision, analyzed the proper procedure for determining clearly established law. Again, Petitioners are asking the Supreme Court to grant certiorari merely to obtain a different factual decision, not to clarify a conflict among jurisdictions. *See Insurance Corp. v. Compagnie Des Bauxiets,* 456 U.S. 694 (1982). A decision favorable to Petitioners would not affect any other cases, it would only apply to the factual situation to the case at bar.

Furthermore, the Tenth Circuit properly analyzed the determination of clearly established law. The Tenth Circuit cited *Anderson v. Creighton,* 483 U.S. 635 (1987), for the proposition that the Supreme Court has admonished against looking at a general right, such as the right to be free of sexual discrimination for purposes of the "clearly established" test. The Tenth Circuit looked at the law of other jurisdictions and closely analyzed those cases in conjunction with its own decisions. The court noted that it was aware of only one case, prior to May 1989, that determined sexual harassment was actionable under the Equal Protection Clause. That case was *Bohen v. City of East Chicago,* 799 F.2d 1180 (7th Cir. 1986).

The Tenth Circuit acknowledged that in order for the law to be clearly established, there must be either a United States Supreme Court or Tenth Circuit decision on point, or that the clearly established weight of authority from other circuit courts must have found the law to be what the plaintiff maintains it to be. *See Medina v. City and*

*County of Denver*, 960 F.2d 1493 (10th Cir. 1992). The Tenth Circuit's position is in accord with other authorities. *See* Martin A. Schwartz and John E. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees*, 9.20, at 537 (2nd ed. 1991). That section was quoted by the Tenth Circuit as stating that "[n]ormally, a single recent case from one circuit is not sufficient to make the law clearly established in another circuit. Also, a district court decision will not ordinarily ' "clearly establish" the law even of its own circuit, much less that of other circuits.' " (footnotes and citations omitted).

The Tenth Circuit Court also stated that to the extent that *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990), held that sexual harassment by a state employer was actionable under the Equal Protection Clause, the circuit court would disagree with the analysis based on the admonishment of the Supreme Court in *Anderson v. Creighton, supra*. This disagreement does not create a conflict, however, because regardless of the time period, both circuits are now in agreement regarding the law. *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989).

Although Petitioners cite general law and cases regarding sexual discrimination, they cite no cases which show clearly established law on the facts of this case. Furthermore, it should be noted again by this Court that these officers are neither "co-workers" nor "co-employees." Petitioners have cited no cases where one would violate equal protection through sexual harassment in a non-employment setting.

### 3. The factual determination regarding constructive discharge does not require the Supreme Court's supervisory powers.

Petitioners argue that the Tenth Circuit's factual determination regarding constructive discharge "departs so far from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision." (Petitioners' Brief p. 37).

Once again, Petitioners are doing nothing more than asking the Court to apply the clearly established constitutional analysis used by the circuit court, but come to a different factual decision.

The Court has exercised its supervisory powers in questions where the lower court's decision threatened the goal of uniformity of federal procedures. *Hanna v. Plumer,* 380 U.S. 460 (1965). The Court has also granted certiorari when questions involved the very jurisdiction of the federal court system. *Bruner v. United States,* 343 U.S. 112 (1952). The Court seldom grants certiorari merely because Petitioners desire a different factual outcome.

Furthermore, the Tenth Circuit was correct in its analysis regarding constructive discharge. The court stated that it has been clearly established since at least 1985 that constructive discharge from employment as to which an employee has a protectionable property or liberty interest may be actionable under 1983. It also stated that it has been clearly established that constructive discharge has existed since at least 1986. The court said that when a reasonable person would view the working conditions as intolerable and when the working conditions are so difficult that a reasonable person in the employee's

position would feel compelled to resign, this constitutes constructive discharge. *Derr v. Gulf Oil Corp.*, 796 F.2d 340 (10th Cir. 1986), and also citing *Bailey v. Kirk*, 777 F.2d 567 (10th Cir. 1985). The court, however, stated that Petitioner Butler had not established a genuine dispute of material facts regarding her working conditions. The court stated that Butler did not establish that she took steps short of resignation, that a reasonable person would have taken. Although she testified to facts suggesting intolerable treatment, she did not formally complain about this treatment until after she had quit. The Court stated that Butler had an alternative to resignation and she knew about that alternative. She could have lodged a formal complaint, and she ultimately did file a formal complaint, but not until after her resignation.

Certainly Petitioner does not dispute any of these facts, but merely would like the United States Supreme Court to come to a different conclusion using the same analysis. Such a situation does not call for the extraordinary remedy of the Court's supervisory powers.

**4. The Tenth Circuit's analysis of Petitioners' First Amendment claims do not conflict with the decisions of other Appellate Courts on these particular facts.**

The Tenth Circuit, in analyzing Petitioners' First Amendment claim states that a public employer may not condition employment or its incidence upon a relinquishment of the employee's First Amendment rights. *Pickering v. Board of Education*, 391 U.S. 563 (1968). Note that none of Respondents were the employer of Petitioners. The

court also acknowledged that the Supreme Court provided guidance regarding what is or is not public concern in *Connick v. Myers*, 461 U.S. 138 (1983). The Tenth Circuit properly determined that in analyzing a First Amendment retaliation for speech claim against a public employer the court must determine whether the employee's speech was on a matter of public concern. The Court must then balance the interest of the employee as a citizen in commenting upon these matters, and also the interest of the State as an employer in promoting the efficiency of the public services it performs.

Again, Petitioners do not argue that the analysis used by the Tenth Circuit is in conflict with other Courts of Appeal. Petitioners, once again, merely dislike the factual determination resulting from this analysis.

The Tenth Circuit was correct both in its statement of controlling law and its application. The Court stated that it was aware of no cases holding that "speech similar to that made by plaintiffs" pertain to a matter of public concern. (Petitioners Appendix p. 111a). Petitioners have cited no cases resulting in a different holding which are similar to speech in this case. Again all Petitioners are asking for is a different factual outcome, not a different application of law.

The Tenth Circuit noted that Petitioners' First Amendment claim against Williams, Sackett and Mitchell suffered from an additional defect in that they were not plaintiff's supervisors. The court stated "[w]e are aware of no case law clearly establishing that a non-supervisor can be liable under 1983 for responding critically to speech made by a co-employee, much less a person who,

as in this case, is not even a co-employee." (Petitioners' Appendix p. 112a). Petitioners have cited to no cases establishing liability under these circumstances.

Petitioners have not set forth grounds adequate for a Writ of Certiorari.

## CONCLUSION

Petitioners have failed to show that the Tenth Circuit Court of Appeals erred in its constitutional analysis regarding qualified immunity as it pertains to Equal Protection, constructive discharge, or First Amendment claims.

Obviously, and understandably, Petitioners disagree with the application of the appropriate constitutional analysis to the facts as they exist in this case. Disagreement with the facts, however, does not create constitutional issues worthy of review by the Supreme Court, particularly, when as here, the Tenth Circuit Court of Appeals properly applied the appropriate constitutional analysis.

Respondents ask that the Writ of Certiorari be denied.

Respectfully submitted this 4th day of June, 1993.

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